

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL MOTION

SUIT No. 1 of 1995

BETWEEN:

HAROLD SIMON

Applicant

and

**CAROL HENRY
TRACEY JOSEPH**

Respondents

Before:	The Rt. Hon. Sir Vincent Floissac	-	Chief Justice
	The Hon. Mr. C.M. Dennis Byron	-	Justice of Appeal
	The Hon. Mr. Satrohan Singh	-	Justice of Appeal

Appearances: Dr. Fenton H.W. Ramsahoye, Q.C., Mr. C. Samuel with him for
the Applicant
Mr. Gerald A. Watt for the Respondents

1995: June 9 and July 3

SATROHAN SINGH J.A.

This is an application for an extension of time within which to appeal. On December 19, 1994, in a Suit brought by the applicant Harold Simon against the respondents for possession of a parcel of land described as parcel 56 at Martin's Village, Antigua, Redhead J entered judgment against the applicant and, on the first named respondent's counterclaim, granted the declarations and orders sought therein. The basis of the applicant's claim to possession was a land certificate issued to the applicant in accordance with the Registered Land Act 1975. This certificate showed parcel 56 as belonging to the applicant. The learned Judge in making the declarations and orders on the counterclaim, found that parcel 56 in fact belonged to the first named respondent and that by a mistake it was included in the applicant's land certificate as part of his property. Acting therefore in accordance with S140(1) of the aforementioned Land Act, the Judge, ordered inter alia "that the Registrar of Lands do rectify the register of land by the cancellation of the land certificate in the plaintiff's name and issue him with a new certificate parcel 143."

By O64 R 5(1) OF THE RULES OF THE SUPREME COURT (REVISION) 1970, the time allowed for appealing from this Order was six weeks from the date the judgment was delivered. The applicant therefore had until January 30, 1995 within which

to file his appeal. He did not do so. On March 31, 1995, some two months later, he filed this motion seeking from this Court an Order for an extension of time within which to appeal from the Judge's order. In an affidavit filed in support thereof, he gave as the reason for the delay:-

"the fact that after the adverse judgment was pronounced, I was unable to secure the resources to seek an opinion on the merits of an appeal until now. I was totally drained of the resources I had by the time the suit came to an end and there is no facility in Antigua and Barbuda for legal aid".

In the said affidavit he stated that he was advised by his Counsel that he had arguable grounds of appeal. He also exhibited his draft grounds of appeal. The application, at the hearing before us, was strenuously opposed by Counsel for the respondent on all points.

Power to extend the time for appealing, is given to this Court by O3 R5 of the aforementioned Rules and the Court may do so on such terms as it thinks fit. For the applicant to benefit from this power, he has to show by affidavit, substantial reasons for his application and grounds of appeal which prima facie show good cause therefor. [See O64 R6(2) of the said rules]. The application therefore calls for the exercise by this Court of a judicial discretion based on good cause. In exercising this discretion, the matters which a Court should take into account are (1) the length of the delay (2) the reasons for the delay (3) the chances of the appeal succeeding if the extension is granted and (4) the degree of prejudice to the respondent if the application is granted [per Mc COWAN LJ in NORWICH AND PETER BOROUGHS B.S. v STEED (1991) 2 ALL E.R. 380]. In PALATA INVESTMENTS v BURT AND SINFIELD LTD AND OTHERS (1985) 2 ALL E.R. 517 ACKNER LJ at p 521 expressed this opinion on the exercise of this discretion:

"in cases where the delay was very short and there was an acceptable excuse for the delay, as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal".

With these thoughts in mind, I now propose to examine the four matters mentioned above.

1. THE LENGTH OF THE DELAY:

Referring to the length of the delay, the facts aforementioned show this to be some

eight weeks after the time for appealing had expired. In deciding whether this can be described as being reasonable or as being inordinately long, the application will have to be considered in accordance with its own particular facts and a relevant factor for such consideration would be the reason for the delay. If there is no reason or the reason is unacceptable then there should have been no delay and a delay of 8 weeks would be inordinately long. Before I determine this first issue therefore, I would seek to answer the next question whether the applicant has established good cause for the delay.

2. REASON FOR THE DELAY:

I have already set out in this judgment the applicant's reason for the delay, that is, his temporary impecunious state. In my view, this assertion of the applicant without more is insufficient to establish an acceptable reason for the delay. This assertion is really the conclusion that this Court should be asked to reach based on evidence of sufficient material in the applicant's affidavit as to his financial circumstances. The applicant's affidavit disclosed no more than this bare assertion.

In *EVELYN v WILLIAMS* (1962) 4 WIR 265, in a similar application where the reason for the delay was the bald assertion of the applicant that he was financially embarrassed *LEWIS J* in the Federal Supreme Court had this to say at p.266:

"In my view, it is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has been done in this case. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the rules by lapse of time.

It was suggested by counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the court should take it as proof that there was this alleged financial embarrassment. The answer to that, in my view, is two-fold. First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must, therefore, be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material."

In *AGGRARAM MAHARAJ v DHANRAJ JAGROO AND ANOTHER* (1985) 37 WIR 398 *BERNARD J.A.*, in the Court of Appeal of Trinidad and Tobago, in similar circumstances said that it was trite law that it was not sufficient merely to assert that one is financially embarrassed in order to obtain the Court's indulgence. For these reasons I would hold that the Applicant has not proved to this Court that he has a substantial reason or for that matter an acceptable reason for the eight weeks delay in this matter,

the onus of proof of which was on him. Returning therefore to the issue of the length of the delay, my conclusion is that there being no proved reason for the delay, there ought not to have been this delay. In the circumstances of this case therefore, I would say that the delay of eight weeks would be inordinately long.

3. CHANCE OF SUCCESS:

The third question to be answered refers to the chance of the appeal succeeding if the applicant's application is granted. I have had the opportunity of reading the pleadings and the judgment of the learned Judge in this matter and I have seen a draft of the applicant's intended grounds of appeal. The real issue of fact before the Judge as I perceive it, was whether plot 56 was mistakenly placed on the applicant's land certificate and the real issue of law was whether, if he so found, he had the power to order that the mistake be corrected. The draft grounds of appeal in my view, seek to do no more than to canvass these very two issues before this Court.

On this issue of the law, I do not think that it can be disputed that S140(1) of the Land Act gives the power to the Judge to order that the mistake be corrected if he so found. The draft grounds of appeal that cover this issue therefore would in my view be unarguable. On the issue of fact, the learned Judge having made his findings from the evidence based on the witnesses' credibility, I need only make reference to the learning to be found in *BENMAX v AUSTIN MOTOR COMPANY LIMITED* (1955) 1 ALL E.R. 325 AT PAGES 326 AND 328 (which is so well known that I do not propose to repeat it here) to show the uphill task of the applicant in seeking to canvass before this Court those grounds of appeal challenging the Judge's findings of fact. On this issue therefore, I would hold that the applicant has failed to show *prima facie* arguable grounds of appeal.

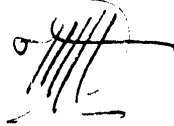
4. DEGREE OF PREJUDICE:

On the fourth question of prejudice, the respondent who was successful in the Court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise on the principles set out by Mc COWAN LJ in the *NORWICH V. STEED* case earlier referred to in this judgment. I have sought to carry out that exercise in this matter. Having regard to my observations on the other issues mentioned earlier and placing everything in the balance, in the exercise of my judicial discretion, I think it would be wrong to deprive the respondents of this entitlement. The applicant has failed to prove substantial reasons for his application and has advanced grounds of appeal which

do not show any real chance of success in the appeal.

Accordingly, I would order that the Motion do stand dismissed with costs to the respondents to be taxed if not agree.


SATROHAN SINGH
Justice of Appeal



I concur. SIR VINCENT FLOISSAC
Chief Justice


I concur. C.M. DENNIS BYRON
Justice of Appeal