

**IN THE COURT OF APPEAL OF THE SUPREME COURT OF  
JUDICATURE**

**APPELLATE JURISDICTION**

**G U Y A N A**

**CIVIL APPEAL NO. 30 OF 2002**

**BETWEEN:**

**MOHAMED NAZIR, suing on his own behalf and  
on behalf of all the other members of a Group called  
NAZDEK Housing Group**

**Appellants**

**- and -**

**THE ATTORNEY GENERAL OF THE REPUBLIC  
OF GUYANA**

**- and -**

**THE CENTRAL HOUSING AND PLANNING  
AUTHORITY, a body corporate incorporated under the  
provisions of the Housing Act, Chapter 36:20 of the Laws of  
Guyana having its office at Homestretch Avenue,  
Georgetown, Demerara, Guyana.**

**- and -**

**THE COMMISSIONER OF LANDS AND SURVEYS**

**Respondents**

**BEFORE:**

|                                                |          |                          |
|------------------------------------------------|----------|--------------------------|
| <b>Hon. Madam Justice Desiree P. Bernard</b>   | <b>-</b> | <b>Chancellor</b>        |
| <b>Hon. Madam Justice Claudette M.C. Singh</b> | <b>-</b> | <b>Justice of Appeal</b> |
| <b>Hon. Mr. Justice Ian N. Chang</b>           | <b>-</b> | <b>Justice of Appeal</b> |

**Mr. A. Chase, SC for Applicants/Respondents**  
**Mr. K. Massiah, SC for Respondent/Appellant**

**2002: November, 5**

**2003: January, 29  
February, 6**

## R U L I N G

### BERNARD, C.:

On 22<sup>nd</sup> May, 2002 the Appellant Mohamed Nazir filed a notice of appeal against a decision of the trial judge in Action No. 3810/1994 which was dismissed on the ground that it disclosed no cause of action. This decision was delivered on 18<sup>th</sup> April, 2002.

The notice of appeal was not served on the Respondents within the time stipulated by Order 2 Rule 4(2) of the Court of Appeal Rules which is within seven days after the original notice has been filed. The notice of appeal had been filed on 22<sup>nd</sup> May, 2002.

The Respondents filed a motion in this Court seeking an order that the appeal filed herein be struck out, and a declaration that the Appellant has failed to comply with Order 2 Rule 4(2). In the affidavit in support of the motion Mr. Ganga Persaud, the Permanent Secretary of the Ministry of Legal Affairs swore that on 12<sup>th</sup> August, 2002 a document purporting to be a notice of appeal was served at the Chambers of Mr. Ashton Chase, Attorney-at-Law for the first and third-named Respondents and he was also informed that a similar notice of appeal was served at the same time on Mr. S. Fraser, Attorney-at-Law for the second-named Respondent.

When the motion first came on for hearing the Appellant appearing in person, was granted leave to file an Affidavit in Answer which he did, and in which he admitted that copies of the notice of appeal were served by him on both Mr. Chase and Mr. Fraser, Attorneys-at-Law on 12<sup>th</sup> August, 2002, but this was done out of an abundance of caution in the event that they had not received copies of the notice of appeal which he had left at the High Court Registry with a request that they be served on the two persons. He requested this Court to grant him an extension of time of three days to effect service of

the notice of appeal or to deem the service on 12<sup>th</sup> August, 2002 as having been served in time.

Counsel for the Applicants/Respondents in support of the motion contended at the hearing that under **Order 2 Rule 4(2)** of the Court of Appeal Rules “a true copy of the notice shall be served upon the respondent within seven days after the original notice has been filed”, and the word “shall” is mandatory. The Respondents had an address for service which the Appellant was aware of and at which he served the notice on 12<sup>th</sup> August, 2002. Further, the Appellant has offered no reasons for not serving the notice of appeal within the requisite time and on which the Court can exercise its discretion. He made reference to the cases of **Toolsie Persaud v. Attorney-General (C.A. No. 101/2000)**, **Ratnam v. Cumarasamy (1964) WLR, 8**, and **Moses v. Kumar (1969) GLR, 417**. He also contended that no address for service was given in the notice of appeal.

Counsel for the Respondent/Appellant conceded that the notice of appeal was not served within the stipulated time, and that **Order 2 Rule 4(2)** had not been complied with. However, by paragraph 8 of the Appellant’s affidavit he was seeking an extension of time to comply, and proffered a reason why he had failed to comply. The reason was that he had left copies of the notice at the High Court Registry for service to be effected on the two attorneys-at-law, and only out of abundant caution had he served them himself on 12<sup>th</sup> August, 2002. He also submitted that all of the cases referred to by Counsel for the Respondents concerned failure to file notices of appeal in time and applications for extension of time to comply. In those cases **Order 2 Rule 3(3)** was relevant and such applications were granted only in exceptional circumstances for good and substantial reasons. He urged the Court to consider that the failure to serve a notice of appeal was

not as serious a non-compliance with the Court of Appeal Rules as failure to file a notice of appeal or a record of appeal, and requested the Court to apply **Order 1 Rule 8** in the interests of justice as in his view the Appellant has an arguable appeal.

A perusal of the Court of Appeal Rules indicates that in most instances the word “shall” is used suggesting the mandatory nature of the order or rule, and in other instances the word “may” suggesting a discretion or less stringent approach. The rules pertaining to the service of documents (Order 1 Rule 9), filing of a notice of appeal (Order 2 Rule 1), time limits for appealing and extensions of time {Order 2 Rules 1, 3(1) and (5)}, service of notice of appeal (Order 2 Rule 4), filing of a record of appeal (Order 2 Rule 13), and withdrawal of appeal (Order 2 Rule 14), to name a few, all utilise the word “shall” suggesting that they are mandatory. In instances where a discretion or option is contemplated the word “may” is employed, e.g. right of audience (Order 1 Rule 6), enlargement of time and departure from Rules (Order 1 Rule 8), and a judge’s power to grant extension of time for appealing {Order 2 Rules 3 (3) & (4)}.

There is no doubt in my mind that the word “shall” in **Order 2 Rules 4(1) & (2)** is mandatory in relation to the service of a notice of appeal. The Appellant therefore was obliged to serve his notice of appeal upon all parties affected by the appeal within seven days after filing the original notice. Not having done so the Appellant is accordingly in breach of **Rule 4(2)**. There is no specific rule for applying to extend this period of time unlike a breach of **Order 2 Rule 3(3)** which empowers a Court in exceptional circumstances and for good and substantial reasons to extend the time for filing a notice of appeal. However under **Order 2 Rule 16(1)** a single Judge of the Court may upon application make orders for extension of time to comply with any of

the Rules. There is decided authority of this Court that this power granted to a single Judge is a delegation of the power of the Court to deal with applications falling under Rule 16(1). The Full Bench of this Court therefore has jurisdiction to hear, determine and make orders in any cause or matter pending before it.

I agree with Counsel for the Appellant that all of the cases cited by Counsel for the Respondents concerned extensions of time to file notices and records of appeal, and the principles upon which such extensions may be granted are adequately discussed and decided in those cases. The failure to file a notice of appeal within the stipulated time is a grave and serious non-compliance of the Rules and an extension of time will be granted only in exceptional circumstances and for good and substantial reasons; also the applicant must include in the affidavit supporting the application the grounds of appeal which prima facie show good cause therefor.

The Appellant acting on his own behalf filed the notice of appeal within the stipulated time, but seemed to have laboured under the misapprehension that he could have left copies of the notice at the Supreme Court Registry for service to be effected, and was not required to effect service personally. This is the danger when one represents oneself and is not au fait with the rules of procedure. He must have become aware several weeks later that he had to effect service himself hence the belated service on the Attorneys-at-law involved.

Counsel for the Appellant has invited the Court to exercise the discretion which it enjoys under Order 1 Rule 8 to enlarge the time prescribed by these Rules for the doing of anything to which the Rules apply or to direct a departure from the Rules in the interests of justice. Admittedly this Court can direct a departure from its Rules, but one has to be cautious in

exercising this discretion too liberally since such free exercise will render our Rules meaningless. The Rules were promulgated for the smooth and efficient operation of the Court, and one has to be careful in departing or encouraging a departure from strict adherence to them.

**Order 1 Rule 8** empowers the Court to direct a departure from the Rules in the interests of justice. This is a catchall phrase which can embrace every situation which may arise, and every applicant can make out a case for the Court to exercise its discretion "in the interests of justice." In order to exercise one's discretion on this ground one ought to consider whether the applicant has an arguable appeal. Counsel for the Appellant sought to convince us that he has. While it is not our remit to determine the success or failure of the appeal at this time, in order to enable us to exercise our discretion in the interests of justice we need to consider whether there is an arguable appeal. The learned trial judge dismissed the action after upholding certain points in limine made by Counsel for the Respondents, one of these being that there was no written agreement evidencing the sale, and the acts of part performance relied upon were not pleaded in the Plaintiff/Appellant's Statement of Claim. A perusal of the Statement of Claim indicates that the Plaintiff and other members of his group were given possession of the lands in question, cleared bush and levelled part of the lands. It can be argued that these were acts of part performance and could have been substantiated or probed by cross-examination; the Appellant was deprived of an opportunity to do so. One cannot say that the appeal will succeed; it may very likely not succeed, but there may be some arguable points which can be made. I am also mindful of the fact that this Appellant appeared in person and seems to have drafted his pleadings himself without the benefit of Counsel.

For these reasons I would exercise the Court's discretion in the interests of justice particularly because I do not view the failure to serve the notice of appeal within the required time to be a serious non-compliance with the Rules. I reiterate that this is by no means intended to encourage breaches of the Rules or to endorse such breaches. The Rules must at all times be complied with, and each application will be considered on its own terms.

Accordingly the orders sought in the motion are refused. The service of the notice of appeal effected on 12<sup>th</sup> August, 2002 is hereby deemed to have been properly <sup>served</sup> ~~filed~~. There will be no order as to costs.

Dated the 6<sup>th</sup> day of February, 2003.

  
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**Desiree P. Bernard**  
**Chancellor.**