

**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:

Hon. Madam Justice Desiree P. Bernard	-	Chancellor
Hon. Madam Justice Claudette M.C. Singh	-	Justice of Appeal
Hon. Mr. Justice Ian N. Chang	-	Justice of Appeal

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

2002: November, 5

2003: January, 29
February, 6

RULING

BERNARD, C.:

On 22nd 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 18th 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 22nd 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 12th 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 12th 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 12th 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 12th 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 12th 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

