"2. The application of English law in order to restrict or prohibit the means of doing charity is expressly prohibited by section 3 of Chapter 39 of the Laws of Sierra Leone."

By Chapter 39 is meant Chapter 18, the Imperial Statutes (Law of Property) Adoption Act. Section 3 thereof is:

"3. So much of English law as prohibits or restricts the alienation or devise of land for charitable purposes, or the bequest of personalty to be laid out in the purchase of land for charitable purposes, shall have no force or effect in the colony."

The argument of Mr. Wright is that in the 1953 action, the learned Chief Justice overlooked this section and no counsel drew his notice to it. We caused a copy of the judgment to be exhibited (and also a copy of the application of December 1961). I do not agree with the argument. Section 3 is not mentioned in the judgment, but clearly it was not overlooked. The learned Chief Justice held that the devise of land offended against the rule against perpetuities and, therefore, was invalid unless its purpose was a charitable purpose in which case (although he did not actually say so) section 3 would save it. He went fully into that aspect of the matter and decided that it was not a charitable purpose. Consequently section 3 did not save it.

The learned Chief Justice did hold that English law applied (this is ground of appeal 1) and that the rule of English law against perpetuities applied to the devise because "the properties concerned are in tenures under English law." The document creating the trust is a will made and probated under English law, which is the general law of the colony." Of course, it is no longer "the colony"; it is now the Western Area of Sierra Leone, but the "general law" as to land tenure, wills and the creation of trusts remains the same.

I would dismiss the application.

Freetown
July 27,
1962

Ames P.,
Benka-Coker
C.J.,
Dove-Edwin
J.A.

[COURT OF APPEAL]

H. M. KANAGBO, W. L. SHERMAN, A. B. FOFANA AND H. M. MORIBA . . . . . *Appellants*

v.

M. J. KAMANDA BONGAY . . . . . *Respondent*

[Civil Appeal 14/62]

Election Petition—Electoral Provisions Act (No. 14 of 1962), ss. 60, 62, 66—Rules 12, 15, 23 of the West African Court of Appeal Rules—Rules 11, 19, 20, 60 of the House of Representatives Election Petition Rules (P.N. 97 of 1951)—Whether court should dismiss appeal for failure to comply with rule 12 of West African Court of Appeal Rules—Meaning of words "At the time of filing the notice of appeal" and "in such manner as the court may order" in section 66 (3) of the Electoral Provisions Act—Whether rule 19 of House of Representatives Election Petition Rules directory or mandatory—Meaning of "immediately" in rule 19—Whether petition should have been dismissed or struck out.

Appellants filed an election petition praying, inter alia, that the election of respondent be declared invalid. A copy of the petition was served on respondent on June 18, but the affidavit of service was not filed until July 2. Jones Ag.C.J. dismissed the petition on the ground that appellants had failed to comply with rule 19 of the House of Representatives Election Petition Rules, which provides: "The petitioner shall, immediately after the notice of the presentation of a petition shall have been served, file . . . an affidavit of the time and manner of service thereof." Appellants appealed. Respondent made a preliminary objection to the hearing of the appeal on the grounds that (1) appellants had omitted from the notice of appeal the names and addresses of certain persons directly affected by the appeal, contrary to rule 12 of the West African Court of Appeal Rules, and (2) appellants had failed to give security for payment of costs at the time of filing the notice of appeal or in the manner ordered by the court, as required by section 66 (3) of the Electoral Provisions Act.

Held, (1) that since respondent was not misled by the omission from the notice of appeal of the names and addresses, the court need not dismiss the appeal.

(2) That there was substantial compliance with section 66 (3) of the Electoral Provisions Act.

(3) That appellants had failed to file an affidavit "immediately after notice of the presentation of a petition shall have been served," as required by rule 19 of the House of Representatives Election Petition Rules.

(4) That the requirement of rule 19 of the House of Representatives Election Petition Rules is mandatory, not merely directory; and

(5) That the petition should have been struck out instead of being dismissed.

Cases referred to: *United Africa Company Ltd.* v. *Owoade* (1954) 13 W.A.C.A. 207; *Liverpool Bank* v. *Turner* (1860) 30 L.J.Ch. 379; *Reg.* v. *Aston* (1850) 19 L.J.M.C. 236; *Reg.* v. *Justices of Berkshire* (1878) 4 Q.B.D. 469.

Berthan Macaulay for the appellants.
Cyrus N. Rogers-Wright for the respondent.

AMES P. There was a preliminary objection made by the respondent to the hearing of this appeal; we heard argument on it and then adjourned our decision for consideration and, meanwhile, heard argument on the appeal itself: so this judgment will refer to both the preliminary objection and the appeal. They involve the interpretation of the Electoral Provisions Act, No. 14 of 1962, which was enacted in April of this year, although its commencement was antedated to October of last year, and also the interpretation of one of the House of Representatives Election Petition Rules. These rules are saved by section 62 of the Act. Nevertheless, some of them are repealed by implication because their provisions, as will be seen, conflict with provisions about the same matters now contained in the Act itself.

The preliminary objection was twofold, as follows:

"(1) The appellants failed to observe the mandatory provisions of rule 12 of the West African Court of Appeal Rules as applied to this court.

"(2) The appellants neglected to comply with the mandatory provisions of section 66 of the Electoral Provisions Act, No. 14 of 1962, whereby jurisdiction is conferred upon this honourable court."

I will call the rules referred to in (1) Appeal Court Rules. The Election Petition Rules apply only to election petitions in the court below and have nothing to do with appeals to this court arising therefrom. Until the Act

became law no election petition could reach this court. Consequently, none of the Court of Appeal Rules is specifically concerned with them. Rule 12, however, seems to me to be applicable to this appeal.

The failure to comply with rule 12, complained of in the objection, is that at the end of the usual form of notice of appeal, where an appellant has to state the names and addresses of persons directly affected by the appeal, the appellant only stated the name and address of the respondent and omitted the name and address of the second respondent, the Returning Officer, who had been joined as a second defendant in the court below, and also the names and addresses of the petitioners themselves.

I see nothing wrong in the failure to include the second respondent; he may be affected by the appeal but only indirectly and, therefore, by rule 15 of the Appeal Court Rules, it is not necessary to serve him, and rule 12 (1) only refers to "all parties directly affected."

The other omission, namely, of the petitioners themselves, is a failure to comply with the rule. They should have been included. Obviously they are directly affected. Their omission is not necessarily fatal. Rule 23 (2) of the Court of Appeal Rules enables this court, but does not require it, to dismiss an appeal for want of due prosecution for failure to comply with a part of the requirements of rule 12. But it also enables this court to make such other order as the justice of the case may require.

In my opinion, this omission has not misled the respondent or embarrassed him. I would allow the form to be amended by adding the petitioners.

I come to the other preliminary objection. It will be necessary to set out section 66 of the Act:

"(1) An appeal shall lie to the Court of Appeal from the determination of the Supreme Court upon an election petition, or a proceeding in the Supreme Court taken under the provisions of section 57, at the suit of a party to such a petition or proceeding, and the decision of the Court of Appeal on any such appeal shall be final to all intents and purposes.

"(2) Notwithstanding any provisions to the contrary the Court of Appeal shall not entertain any appeal under this section unless notice of such appeal shall have been given within 21 days of the determination in question.

"(3) At the time of filing the notice of appeal (otherwise than an appeal by the Attorney-General) the appellant shall give security for the payment of all costs, charges and expenses which may become payable by him to any witnesses summoned on his behalf or any respondent. The security shall be of such amount (not exceeding £300) and shall be given in such manner, as the court may order and in the event of any failure to comply with such order, no proceedings shall be heard on the appeal."

The complaint is that the appellants, although they have given security for payment of costs, did not do so at the time of filing the notice of appeal, nor in the manner ordered by the court. This section is a new enactment, designed to introduce the new right of appeal to this court. This preliminary objection is concerned with its subsection (3). It looks as if subsection (3) was an adaptation of section 60, which is about security for costs in the court below, but with such alterations as the legislature thought were needed to meet the case of appeals.

I will, therefore, set out section 60:

" (1) At the time of presenting an election petition, or within such time as the court may order, the petitioner shall give security for the payment of all costs, charges and expenses which may become payable by him to any witnesses summoned on his behalf or to any respondent.

" (2) The security shall be of such amount (not exceeding £300), and shall be given in such manner as the court may order and in the event of any failure to comply with such order no proceedings shall be heard on the petition."

It will be useful to see what the law as to security for costs in the court below was before this enactment. It was to be found in rule 20 of the Election Petition Rules, which was:

" 20. At the time of the presentation of the petition, or within three days afterwards, the petitioner shall give security for the payment of all costs, charges and expenses which may become payable by him to any witness summoned on his behalf or to any respondent.

The security shall be to an amount of £100 and shall be given either by deposit of money or by recognisance entered into by not more than four sureties or partly in one way and partly in the other."

Under that rule the petitioner knew, before he presented his petition, exactly what he had to do. The amount of security was fixed, the method could be a deposit or by recognisance, as he liked. Consequently, he could easily do it " at the time of presentation of the petition or within three days afterwards." The next few rules provided how the deposit was to be accounted for, and so on, and before whom the recognisance was to be executed, and also the method in which the respondent could, if he wished to, object to any surety. All those rules have been impliedly revoked, because the Act provided new procedure. Under this new procedure the petitioner does not know the amount of security, nor the manner in which it is to be given. He has to find out from the court and get an order. Obviously, it will not be known " at the time of presenting his petition." He can, however (in the court below), get an order from the court as to the time within which it is to be done.

Turning now to section 66 (3), about the security for costs in this court, the provisions are more difficult, to say the least. The appellant is not able to get an order from this court as to the time within which he is to provide security. It is to be done " at the time of the filing of the notice of appeal." He cannot possibly do that because the amount is not fixed, and he cannot choose to make a deposit or file a recognisance; these are matters which now have to be ascertained by seeking an order of court.

The order of the court in the instant appeal was obtained on July 12, and was for the deposit of £5, and a bond for £30 by the appellants jointly and severally with one surety to be approved by the registrar, all to be done within seven days, which it was. The preliminary objection is that it was not done " at the time of filing the notice of appeal," nor " in the manner ordered," because a bond was not filed and instead there was a cash deposit of £35. It was decided in the appeal of *U.A.C. Ltd* v. *Owoade* (1954) 13 W.A.C.A. 207 that a cash deposit is an adequate compliance with an order to file a recognisance; so that part of the objection fails.

The other part depends upon what the section means by the words " at the time." There is no provision for getting an order of the court beforehand and it cannot be done until the notice of appeal has been filed. Consequently, the

only certain thing is that "at the time" in this section cannot mean "at the time" as understood in common parlance. What does it mean? I prefer not to attempt a definition of what it means. I prefer to examine what the appellant did and to consider whether or not it is reasonable to conclude that it was done "at the time" within the meaning of the section, and the intention of the legislature.

The decision in the court below was given on July 1. The appeal was filed on the 5th. Notice of motion to decide the amount and manner of security was lodged on the 6th (the receipt for the fee is dated the 7th, which may have been due to the matter having to be referred to the master to find out if the date stated in the notice was suitable).

Is it reasonable to suppose that this was within what the legislature must have intended by "at the time" for something which cannot be done at the time? When one keeps in mind what the procedure used to be until this new Act, and what it now is, in my opinion it is reasonable to suppose so.

I now come to the merits of the appeal itself. Rule 19 of the Election Petition Rules is as follows:

> "The petitioner or his agent shall, immediately after notice of the presentation of a petition shall have been served, file with the master an affidavit of the time and manner of service thereof."

The petition was presented to the Supreme Court on June 16. On the 27th, the respondent took out a summons for the application to be dismissed because there was no affidavit as required by rule 19. On July 2, the appellants filed the necessary affidavit. On July 4, the petition was dismissed on the ground that rule 19 had not been complied with.

There are five grounds of appeal. I will consider them in the order in which they were argued by Mr. Macaulay for the appellants. Grounds 3, 4 and 5, which he argued in that order, I will consider together: they are as follows:

> "(3) The learned judge failed to consider whether or not the prescribed formality in rule 19 was essential to the validity of the presentation and hearing of the petition; assuming that he did so, he erred in impliedly treating rule 19 of the Election Petition Rules in the same manner as rules 15 and 16 of the said rules, and concluded that the former was not directory but mandatory, thereby implying further that the filing of an affidavit of service was essential to the validity of the presentation and hearing of an election petition, even though the time for hearing the said petition had not yet been fixed in accordance with rule 36 of the said rules.
>
> "(4) In any case not only was there a substantial compliance with the rule in that an affidavit of service was in fact filed before a time for trial was fixed, but the respondent himself, one of the class of persons whom rule 19 is intended to secure in the sense that a petition shall not be heard which was not served on him within the time prescribed by rule 15, entered an appearance to the petition on the next day after service on him within the prescribed time. The learned judge erred in taking the view that it was, nevertheless, open to the respondent to take the objection he did.
>
> "(5) That although there is an express provision in section 60 (2) of the Act and implied provisions in rules 15 and 16 that the proceedings in an election petition may be defeated for non-compliance, nevertheless the learned judge should have considered whether the objection taken was a

formal objection within the meaning of rule 59. Assuming that the objection was not a formal objection, the learned judge, by virtue of section 62 (1) of the Act and rule 60, should have treated the non-compliance in accordance with the practice under the Supreme Court Rules, Ord. 50."

The procedure regarding election petitions is governed by the Act and by the Election Petition Rules, which are based on English law, our rule 19 being the same as rule 70 of the English Parliamentary Election Petition Rules. Provision is made for presentation of a petition and so on up to the stage at which the matter may be brought before the court. These provisions are different from those relating to an ordinary civil action. Nowhere is provision made for entry of appearance. Indeed Mr. Macaulay himself pointed this out, and submitted that consequently rule 60 of the Election Petition Rules applies and one must turn to the Supreme Court Rules, and to Order 9, r. 5. That rule 5 and the whole Order, however, is about entry of appearances to writs of summons. I suggested to him that rule 19 of the Election Petition Rules might take the place of having to enter an appearance. He submitted that it did not, and that rule 19 was to let the court know at the time of trial that the petition was served in the prescribed time. That implies, of course, that, as long as the court knows at the time of trial, the rule has served its purpose and been sufficiently complied with.

With respect, I do not agree. If that were so, the rule might as well require the affidavit to be filed "ultimately" instead of "immediately after."

In my opinion, entry of appearance is not an appropriate step in these matters and is not required. Indeed, in England, Order 54, r. 4F, of the White Book particularly states that a respondent to an originating summons relating to parliamentary or municipal elections petitions "shall not be required to enter an appearance." There, likewise, their Election Petition Rules make no provision for entry of appearance to an election petition.

Our rule 11 enables anyone who has been returned as a member to file with the master his name and address or the name and address of an agent. This is the nearest that the procedure gets to "entry of appearance"; but this is not an entry of appearance because it can be done at any time, even before there is any petition presented, to which an appearance could be entered. Also this procedure is not compulsory, but is optional at the choice of the elected member.

In my opinion, the absence of any provision for entry of appearance gives much purpose to rule 19. Is it a mandatory provision or only directory, using the word "mandatory" in the sense in which the learned judge used it, of an obligatory step, a condition precedent, which a petitioner must fulfil?

Many cases were cited to us during the argument and passages from textbooks read by both sides. They only show how true still is the passage from the judgment of Lord Campbell in *Liverpool Bank* v. *Turner* (1860) 30 L.J.Ch. 379, 380 and 381, which is cited by Craies in his Treatise on Statute Law (4th ed.) at p. 233.

Lord Campbell said:

> "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed."

For this reason, the two recent decisions of this court in *Speck* v. *Keister* and *Foday* v. *Koroma*, which Mr. Wright stressed, are not necessarily decisive here. Those decisions concern provisions of the Appeal Court Rules. We are concerned here with a provision of these different rules.

My interpretation is that rule 19 is absolute and mandatory and that failure to comply with it is fatal. It is the only provision in the rules for getting evidence of service on record for the court file. This is why, I think, it is to be done " immediately after service." The essence of the procedure in election petitions is that the matter should progress and not stand still. No court can proceed to a hearing without having the prescribed evidence that service has been effected.

I see no reason to consider ground of appeal (3) in any more detail. Even supposing the learned judge had failed to consider something which he ought to have considered (I am not saying that he did) it would make no difference, because I respectfully agree with the conclusion at which he arrived about non-compliance with the rule.

Ground of appeal (4) is concerned with substantial compliance. The petition was presented on June 16. This affidavit was filed on July 2. In my opinion, this cannot be considered to be substantial compliance, even could substantial as distinguished from strict and exact compliance suffice. Does the fact that the respondent made a formal entry of appearance make any difference? In my opinion, no. A petitioner has to comply with the prescribed procedure. If a respondent does something not in the prescribed procedure, it cannot affect the prescribed procedure. The respondent cannot alter a mandatory rule.

Ground (5) does not any longer arise.

Returning to grounds (1) and (2), here I agree with the appellants that it was wrong to " dismiss " the petition upon an application made by summons in chambers. There had been no hearing on the merits and could not have been except in open court. In my respectful opinion what the learned judge should have done was to have ordered that the petition be struck out, and not to have dismissed it.

I would allow the appeal only to the extent of setting aside the judgment dismissing the petition and substituting an order that the petition be struck out.