IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ELECTION COURT

SUITS NOS. M-108, M-109 & M-110 OF 1998

IN THE MATTER of the Representation of the People Act

A N D

IN THE MATTER of the Kingston and St. St. Andrew Corporation Act and the Parish Councils Act

A N D

IN THE MATTER of the Election Petitions Act

A N D

IN THE MATTER of an Application by the Constituted Authority established under Section 44A of the Representation of the People Act for the voiding of the taking a poll in the electoral divisions of Rae Town, Mona and May Pen Western.

Lennox Campbell, Cordell Green, Lackston Robinson and Miss Nicole Foster instructed by the Director of State Proceedings for the Constituted Authority.

Raymond Clough for Jennifer Newman

Miss Dorothy Lightbourne for George A. Planto

Abe Dabdoub for Anthony B. Roach

Linton Walters for Barbara M. Green, Leopold Anesley Hylton and Joseph Knight

HEARD: **March 1, 2 and 9, 1999**

WALKER J.

On September 10, 1998 local government elections were held in respect of the Kingston and Saint Andrew Corporation and Parish Councils islandwide.

On September 25, 1998 by way of notices of motion the Constituted Authority filed applications for voiding the polls taken in three electoral divisions in which these elections were contested, namely the electoral divisions of Rae Town in the parish of Kingston, Mona in the parish of Saint Andrew and May Pen Western in the parish of Clarendon.

It was common ground that these applications were out of time, having been made one day late contrary to the express terms of s. 38 of the Election Petitions Act. Indeed, on the evidence of the Chairman of the Constituted Authority the applications were already one day late when on September 25, 1998 he gave instructions to file them. S. 38 reads as follows:

> "Where under section 37 the Constituted Authority makes an application to the Election Court, the application shall be made within fourteen days of the taking of the poll".

In an attempt to overcome this hurdle the Constituted Authority applied to this court for an extension of time within which to make these applications. The application for extension of time was buttressed by three affidavits in the first of which Owen Dustin Marsh deponed inter alia as follows:

> "2. I am a retired Judge and Chairman of the Constituted Authority established by Section 44A(1) of the Representation of the People Act.
> 3. That a General Election of Councillors to serve on the Kingston and St. Andrew Corporation and Parish Councils was held on the 10th day of September, 1998.
>
> 4. That on the 23rd and 24th days of September, 1998 there was civil unrest in Kingston and in particular in the downtown Kingston area. That as a result communication between the Constituted Authority and the Attorney General's Chambers was disrupted. In the course of these disturbances the staff at the Attorney General's Chambers were unavailable and this frustrated the Authority's efforts to have the Motions filed.
>
> 5. That instructions to file Notices of Motion were given by the Constituted Authority on the 25th September, 1998. The delay was a direct result of the said disturbances."

In the second affidavit, Nicole Denise Foster, Crown Counsel in the chambers of the Attorney General swore inter alia in the following terms:

> "2. On the 10th day of September 1998 a poll was taken in the electoral divisions of Rae Town, Mona and May Pen Western.
>
> 3. That on the 23rd day of September 1998 I was informed by the Constituted Authority that instructions to void the polls would be delivered on the said date.
>
> 4. On the 23rd day of September 1998 there was civil unrest involving elements supporting a person popularly known as "Zekes". During this civl unrest there was violence throughout the downtown Kingston area. The

staff of the Attorney General's Chambers were advised to vacate the office.

5. I am informed by Mrs. Hazel Sewell, the Office Manager in the Attorney General's Chambers, and do verily believe that on the 23rd day of September 1998 she called the City Centre Police Station and was informed by the police that several streets in Kingston were blocked. As a result the Attorney General instructed the closure of the office in the interest of safety. That the offices were closed at approximately 1 pm. That on the 24th and 25th days of September 1998 there was a continuation of civil unrest in downtown Kingston and as a consequence the Attorney General's Chambers was closed.

6. On the 25th day of September 1998 while at home I received a call requesting that I attend the office to ensure the filing of the election applications. On the said date I received the necessary instructions for the filing of the applications, and, along with, Lackston Robinson, prepared the necessary applications.

7. That during the preparation of the applications Mr. Robinson and I were in constant communication with the Registrar of the Supreme Court so as to ensure that the Supreme Court registry staff would be available for the filing of the documents. We were informed by the Registrar that the Registry would be closed early. The Notices of Motion were filed at approximately 2 pm.

8. That the delay in filing the said Notices of Motion was not deliberate and I humbly pray that the court grant the application to extend time."

The third affiant was Ena Harris, an Inspector of Police stationed at Central Police Station in Kingston. She said:

"2. That during the period September 23 to September 25, 1998 there was civil unrest in Downtown Kingston in the form of road-blocks, riots and the firing of guns. That as a consequence there were fatalities and closure of offices and businesses. Throughout the period, Downtown Kingston and its environments were generally unsafe."

In this scenario the first question that arises for decision is whether or not this court has jurisdiction to extend the time fixed by s. 38 for making an application for voiding a poll. Obviously, the answer to the question must, itself, turn on a true construction of s. 38. Mr. Campbell for the applicant argued strenuously that the court has always had an inherent jurisdiction to extend time in circumstances where a time fixed by law has expired. He submitted that the court has always demonstrated a reluctance to drive a litigant away from the judgment seat without a hearing on the merits. Where the instant proceedings were concerned he submitted that no interested party could complain of prejudice or hardship if the court were to exercise its discretion in favour of the applicant. He contended that the circumstances of civil unrest in downtown Kingston described in the evidence adduced by the applicant adequately explained the reasons for the lateness of its applications to the court. Mr. Campbell submitted that a combination of s. 24 (3) of the Election Petitions Act and s. 676 of the Civil Procedure Code gave jurisdiction to this court to extend time on the instant application. Finally, Mr. Campbell argued in effect that what he described as the "old authorities" should not be slavishly followed since the amendment to the Election Petitions Act, which created this court, established a new regime into which the strict interpretation that had formerly been placed on a statute of this nature had not been transported.

Statutes which touch and concern election petitions have always been strictly construed. In Nair v Teik (1967) 2 All E.R. 34 their Lordships of the Privy Council, in placing a mandatory rather than a directory construction upon a provision under r. 15 of s. 38 of the Election Offences Ordinance, 1954 of Malaysia, emphasised the need when

dealing with an election petition for a speedy determination of the controversy in the interests of the public. But nearer in point is the local case of Stewart v Newland (1972) 12 J.L.R., 847 which was brought to the court's attention by Mr. Dabdoub. In Stewart's case it was held, inter alia, that the provisions of s. 6 of the Election Petitions Law, Cap. 107 (now s. 6 of the Election Petitions Act) are mandatory and must be strictly complied with and, therefore, that the court had no jurisdiction to extend the time for service of the petition. In his judgment Rowe J (as he then was) said at p. 851 F:

> "In my opinion, and I so hold, the provisions of s. 6 of Cap. 107 which provides that the documents named therein, "shall within ten days after the presentation of the petition, be served by the petitioner on the respondent," are mandatory and must be strictly complied with. The provisions of s. 9, Cap. 107, refer to the methods by which service ought to be effected and not to time within which service must be effected. Section 23 (3) of Cap. 107 which deems election petitions to be proceedings in the Supreme Court is made subject to the provisions of the Election Petition Law and does not have the effect of empowering this court to apply s. 676 of Cap. 177 to enlarge the time for service prescribed by s. 6 of Cap. 107. I hold that I have no jurisdiction to extend the time for service as requested by the petitioner in the summons, and I hold further that an application for substituted service must be made within the ten-day time limit fixed by s. 6 of Cap. 107 and whatever order is made must be performed within the said 10 days."

In Jamaica the Election Petitions Act was amended in 1997 by Legislation which provided for the establishment of this court and created a new regime and procedure for voiding the taking of a poll at elections. Suit No. M001/98 (unreported) concerned an application by the Constituted Authority established under Section 44 (A) (1) of the Representation of the People Act for the voiding of the taking of a poll in the constituency of West Central St. Andrew. The judgment of the Election Court was

delivered on March 3, 1998. I was a member of that Court and in my judgment (at p. 24) I observed as follows:

> "Clearly, the primary objective of this amending legislation is to provide for an effective safeguard against the twin spectres of violence and corruption by which our elections have been bedevilled over many years."

I might well have added that that objective included the expeditious determination of complaints arising out of elections whether held at the national or parochial level. One has only to examine the various provisions enacted by the amending legislation to appreciate that the Election Court and the proceedings related thereto are largely time regulated. For example:

(a) S. 38 - provides that an application of the Constituted Authority for voiding the taking of a poll must be made within 14 days of the taking of the poll;

(b) S.36(3) - provides that the Election Court having heard the matter must deliver its decision within 48 hours of arguments being completed;

(c) S.36(4) - provides that the Election Court must complete its work within 6 months of the date of the taking of the poll.

In my view the tenor of the above provisions, in all of which time limits are fixed, reflect a clear legislative intent to make time of the essence in providing for an expeditious disposition of such electoral matters as the legislation addresses.

I turn now to consider whether as submitted by Mr. Campbell s. 24 (3) of the Election Petitions Act confers a jurisdiction upon this court to extend time for making the applications with which we are here concerned. S. 24(3) reads as follows:

> "An election petition shall be deemed to be a proceeding in the Supreme Court and, subject to the provisions of this Act and to any directions given by the Chief Justice, the provisions of the Judicature (Civil Procedure Code) Law and the rules of court shall, so far as practicable, apply to election petitions."

On examining this section my first observation is the obvious one. It is that the section expressly applies to an election petition. It makes no mention of an application of the Constituted Authority which is something quite different, such an application being governed by s. 38 of the same Act. Significantly, I would think, no provisions similar to the provisions of s. 24 (3) were included in the amending legislation to govern applications made under s. 38. As it seems to me, s. 24(3) contains a provision of general application (i.e. a provision relating to election petitions generally) whereas s. 38 embodies a specific provision (i.e. a provision relating specifically to applications made by the Constituted Authority to the Election Court). On the basis, therefore, of the legal maxim generalia specialibus non derogant s. 24 may not properly be applied to matters falling within the purview of s. 38. And, of course, it follows from the inapplicability of s. 24 that s. 676 of the Civil Procedure Code would also be inapplicable and may not be prayed in aid in relation to applications made under s. 38.

As regards the explanation proffered for the applicant's lateness, civil unrest there was in downtown Kingston between September 23 and 25, 1998, but there is no evidence that the Registry of the Supreme Court remained closed for an entire day during that

period of time. For that matter there is no evidence that the Registry was closed, even partially, on any working day between September 11, 1998 (the day after the poll) and September 22, 1998 (the day before the disturbance). It is a notorious fact that the office of the Director of State Proceedings which represents the applicant is located but a "stone's throw" away from the Registry and, notwithstanding the state of civil disorder which prevailed, it would have been a relatively easy exercise to file these applications within the allotted time had instructions been timeously given by the Constituted Authority and the necessary documents prepared with reasonable promptitude. This is, indeed, a lame excuse.

In the result I have concluded that the provisions of s. 38 of the Election Petitions Act are mandatory and must be strictly construed. By parity of reasoning I hold that the rules of construction which are applicable and have hitherto been applied to election petitions falling under election petitions legislation, as demonstrated by Stewart (supra), are also applicable to applications made by the Constituted Authority to the Election Court. In my judgment, therefore, this Court has no jurisdiction to grant this application for extension of time.

Application refused.

Having been satisfied that the substantive motions could not stand in the light of this judgment, the Court subsequently dismissed those motions.