

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 122 OF 1994

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

BETWEEN

CLIFFORD BROWN
DIANA BROWN
RONALD WILLIAMS

APPLICANTS

A N D

THE RESIDENT MAGISTRATE
SPANISH TOWN RESIDENT
MAGISTRATE'S COURT
ST. CATHERINE
(Hon. Mrs. Von Cork)

A N D

THE NATIONAL CONSTRUCTION
COMPANY LIMITED (a once
dissolved Limited Liability
Company)

RESPONDENTS

Berthan Macaulay Q.C. for the applicants

No Appearance for the respondents

July 31, 1995

RATTRAY P.:

On the 31st July 1995 the applicant sought by Notice of Motion to relist a Motion for leave to appeal to Her Majesty in Council filed on the 24th of April 1995 which had been dismissed for want of prosecution by the Court of Appeal on the 5th of June 1995 there being no Appearances.

The Motion to relist first came before the Court on the 8th of May 1995 when on the application of Mr. Berthan Macaulay Q.C. for the applicant the matter was taken out of the Court list. It was subsequently relisted for the 5th of June with the consequences referred to above.

When the Motion to relist came before the Court on the 31st of July the respondent neither appeared nor was represented as indeed was the position on the two previous occasions.

Mr. Macaulay Q.C. submitted that the Court should exercise its discretion to relist the Motion and to treat the hearing of the Motion as the hearing of an application for conditional leave to Her Majesty-in-Council.

He relied upon the affidavit of Joyce Brown sworn on the 19th July 1995 to establish the reason for Counsel's non-attendance at the Court of Appeal on the 5th of June 1995.

The relevant paragraphs of the affidavit are as follows:

- "4. That I have seen the Court of Appeal list for the week beginning the 5th June 1995, a copy of which is now produced and shown to me and marked "JB3" - that the said list does not contain the matter to be heard on any specific day of that week.
5. That during the week before the 5th June 1995, Mr. Berthan Macaulay, Counsel for the Applicants was informed on the telephone by someone in the Court of Appeal Registry when he enquired for the date for the hearing of the matter, that the matter was fixed for the 8th day of June 1995, and he so informed his clients. I verily believe this is true, because on the 8th of June 1995, the applicants attended at Berthan Macaulay's Chambers and went to the Court of Appeal with Mr. Macaulay before 9:30 a.m.
6. To the surprise of both Mr. Macaulay and his clients, there was no sitting of the court. On enquiring from the Registry, it was found that the Clerk of Court on the 5th June had recorded an order as follows:

"No Appearance Motion dismissed"

The well-established procedure in the Court of Appeal is that the weekly lists do not fix a specific date for a particular case and the matters listed are taken in

order of listing unless Counsel appears before the Court and applies for and receives a specified date of hearing. As the Court of Appeal list exhibited for Monday 5th June to Friday 9th June shows the Motion was the first matter listed. This was in keeping with a practise of the Court to take applications by way of Motion before hearing substantive appeals. The contents of Joyce Brown's affidavit in this regard conflict with the established practise and procedures of the Court as well as the recollection of Gordon J.A. who was a member of the panel on June 5 and July 31.

Mr. Macaulay, Q.C. further submitted that the Court should exercise its discretion in relisting the appeal for two additional reasons:

- (1) The Motion was unopposed.
- (2) "The matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards ... and the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of one thousand dollars or upwards, final decisions in any civil proceedings."

The appeal therefore in his submission is as of right. [See Section 110 of the Constitution of Jamaica].

The Court of Appeal must necessarily give the same careful consideration to matters before it whether they are unopposed or not. Application of considerations of justice clearly demand this.

In the application of Section 110 of the Constitution of Jamaica to this Motion all the circumstances must be considered. The respondent brought plaints in the Resident Magistrate's Court against the applicants for recovery of possession of property in the occupation of the applicants of which property the respondent was the registered owner. During the hearing the applicants through their Counsel took the point that the respondent a Company which had been removed from the Register of Companies but had been restored by Order of the Master was not properly restored because as Counsel submitted the plaintiff (respondent) was not a proper party to the action as the Order for restoration should have been made by a Judge in Chambers and not by the Master. The Resident Magistrate found no irregularity and ruled against the submission. The applicants applied for Certiorari to quash the ruling of the Resident Magistrate. The application was dismissed by the Full Court of the Supreme Court. The decision of the Full Court was appealed by the applicants and the appeal was dismissed by the Court of Appeal. It is in respect of this decision that the applicants now seek leave to appeal to Her Majesty-in-

Council. Is the appeal to Her Majesty-in-Council as of right as provided by Section 110 of the Constitution? We think not.

The matter in dispute is a ruling of the Resident Magistrate as to the status of the respondents. The case has not been concluded in the Resident Magistrate's Court. There is no final determination in the civil proceedings. The case in the Resident Magistrate's Court should be relisted and the trial proceed to judgment. What would be in dispute on the appeal to Her Majesty-in-Council is not the property which is of the value of \$1000.00 or upwards, but the ruling of the Resident Magistrate on the status of the plaintiff.

For all these reasons including the absence of a satisfactory explanation as to Counsel's non-appearance on the date listed for the hearing, and the history of these applications, the Court refused to exercise its discretion in favour of relisting the Motion.