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IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 37/77

BEFORE: The Hon. Mr. Justice Leacroft Robinson, President
The Hon. Mr. Justice Zacca, J.A.
The Hon. Mr. Justice Henry, J.A.
The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Melville, J.A.

Re Plaint No. 232 of 1975

BETWEEN - JAMES CHAMBERS

AND

MARY BENNETT - DEFENDANTS/APPELLANTS

AND - ADMINISTRATOR GENERAL FOR JAMAICA

(ADMINISTRATOR EST. ALEXANDER GORDON, DEC'D.) - PLAINTIFF/RESPONDENT

Re Plaint No. 233 of 1975

BETWEEN - LENFORD GORDON

AND

RETINELLA GORDON - DEFENDANTS/APPELLANTS

AND - ADMINISTRATOR GENERAL FOR JAMAICA

(ADMINISTRATOR EST. ALEXANDER GORDON, DEC'D.) - PLAINTIFF/RESPONDENT

And Re Plaint No. 234 of 1975

BETWEEN - JAMES GORDON - DEFENDANT/APPELLANT

AND - ADMINISTRATOR GENERAL FOR JAMAICA

(ADMINISTRATOR EST. ALEXANDER GORDON, DEC'D.) - PLAINTIFF/RESPONDENT

Mr. Horace Edwards, Q.C. for Defendants/Appellants.

Dr. Adolph Edwards for Plaintiff/Respondent.

February 14, 15, 16, 1979

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ROBINSON, P.:

By consent, these three cases were tried together and in each case the Resident Magistrate for the parish of St. Catherine gave judgment for the plaintiff. All five defendants decided to appeal and written notices of appeal were lodged on their behalf. At the time of lodging the appeals, the proper amounts required as security for the due prosecution of the appeals and as security for costs etc. were tendered to the clerk in the Court's Office. The clerk, however, being erroneously of the opinion that too much money was being deposited, refunded what she considered to have been tendered in excess of the proper amounts. Equally erroneously the refunds were accepted.

In the result, an insufficient amount was deposited as security for the due prosecution of the appeals and as security for costs. And although efforts were later made to correct the position, the plaintiff/respondent was put in a position whereby he was able to give notice of intention to take the following preliminary objections at the hearing of the appeals -

> "1. The amounts given as security for costs are inadequate.
>
> 2. Security for costs was not given within 14 days after the lodging of the appeal as required by the Law. "

The defendants/appellants do not dispute that both the amounts deposited as security for the due prosecution of the appeals and as security for costs etc. were in fact made after the times for so doing had elapsed and they have now applied to this Court for leave to extend the time for the making of such deposits so as to enable their appeals to be heard.

The Resident Magistrate's Court is a creature of statute and it has time and again been held, and rightly so, that one must look to the creating statute (or statutes) and to that statute (or those statutes) only so as to determine the jurisdiction, powers and duties of that Court and the conditions on which a right of appeal, if any, from that Court may be exercised.

Now section 251 of the Judicature (Resident Magistrates) Act provides for appeals to the Court of Appeal in civil matters and section 256 requires that:

> "The party appealing shall, at the time of taking or lodging the appeal, deposit in the Court the sum of one dollar as security for the due prosecution of the appeal, and shall further within fourteen days after taking or lodging of the appeal give security, to the extent of twenty-four dollars for the payment of any costs that may be awarded against the appellant and for the due and faithful performance of the judgment and orders of the Court of Appeal."

The section also provides that such last mentioned security may be given by a deposit of the money and that:

> "On the appellant complying with the foregoing requirements, the Magistrate shall draw up, for the information of the Court of Appeal, a statement of his reasons for the judgment, decree, or order appealed against."

The above provisions are more or less repetitions of the provisions which obtained from as far back as 1887. (See sec. 235 of Law 43 of 1887, and sec. 240 as amended by sec. 15 of Law 34 of 1888), and in the case of Gordon & Cooke [1890] 1 Stephens' Report at p. 64, it was held not fatal to the hearing of the appeal that the deposit as security for the due prosecution of the appeal was not given at the time of taking or lodging the appeal provided that both securities were given within 14 days as had been done. The view held here was that failure to give the securities within the 14 days would have been fatal because the Magistrate was not obliged to give his reasons unless the preceding requirements were complied with in the manner prescribed and without his reasons, "the whole machinery provided by the law for working out the appeal would be thrown out of gear." Be it observed that at the time this case was decided there was then no provision in the law similar to the present section 266 which provides that:

> "The provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right; and in case any of the formalities prescribed by this Act shall have been inadvertently, or from ignorance or necessity omitted to be observed it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance, or necessity, and if the justice of the case shall appear so to require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from. "

This provisions was first introduced by section 8 of Law 39 of 1894. Notwithstanding this provision, however, it was held in the case of Jamaica Mineral Waters Company Ltd. v. The K.S.A.C. [1936] 3 J.L.R. 10 that it was a condition precedent to the perfection of a civil appeal from a Resident Magistrate's Court that the grounds of appeal should be served and filed within the prescribed time, that failure so to do involved a cessation of the right of appeal and that such failure could not be cured by the Court under section 268, (the then equivalent to the present section 266).

It was clear that the Legislature was not happy with this interpretation of the Law and so it promptly proceeded, by section 3 of Law 8 of 1936, to amend the portion of what is now section 256, i.e. the portion dealing with the serving and filing of grounds of appeal, by inserting the words "subject to the provisions of section 268" so that the relevant portion of section 256 now reads:

> "The appellant shall, within twenty-one days after the day on which he received such notice as aforesaid, (i.e. of the lodgement of the Magistrate's reasons for judgment) draw up and serve on the respondent, and file with the Clerk of the Court, the grounds of appeal, and on his failure to do so his right to appeal shall, subject to the provisions of section 266, cease and determine. "

This provision clearly indicates that the Law regards the drawing up and serving and filing of the grounds of appeal as one of "the formalities prescribed in this Act" as section 266 deals with formalities only. And it would seem to follow, indeed the inference seems irresistible, that the other requirements of section 256, as to the giving of security etc. would constitute some, if not all, of the other "formalities" prescribed by the Act. But this was adjudged not to be so.

In Sherwood v. Miller, [1941] 4 J.L.R. 10, it was held that although section 261 of Cap. 432 (the then equivalent of section 256 of the current Law) had not been complied with, it would be an injustice not to hear the appeal having regard to the practice existing in some courts to extend the time for giving security to meet the convenience of the parties, but that the practice referred to was wrongand must cease. The Court then prevailed upon counsel for the respondent not to press his preliminary objection and the objection having been withdrawn proceeded to hear the appeal on the merits. However, in Willocks v. Wilson et al [1944] 4 J.L.R. 217, it was held that the giving of security for the costs of a civil appeal from a Resident Magistrate's Court within the time prescribed by section 261 of Cap. 432 was a condition precedent to the hearing of the appeal and that it was not a "formality" within the meaning of section 269 (now section 266).

Of course, having held that it was not a formality, it was obliged to concede that the Sherwood and Miller case "may be said to appear to be inconsistent with this opinion" as there would have been no jurisdiction to hear that appeal even with the withdrawal of the preliminary objection. And so the Court concluded that "considering the course the hearing of the appeal took in that case (i.e. the Sherwood v. Miller case) it cannot be regarded as a binding decision."

Thus the position remained for some 8 years until the case of Aarons v. Lindo [1953] 6 J.L.R. 205 when it was held that the requirement to deposit the security for the due prosecutionof the appeal at the same time as the taking or lodging of the appeal was a formality and that the Court did have the power under section 269 of Cap. 463 (now section 266), to allow the appeal to be heard notwithstanding a failure to comply with the requirements as to time.

One would have thought that this case would have a laid the matter to rest as far as the securities referred to in section 256 were concerned. But again, it was not to be so.

In Welds v. Montego Bay Ice Company Ltd. & Smith [1962] 5 W.I.R. 56; 8 J.L.R. 83; it was again held that the giving of security for costs in accordance with the provisions of section 256 was still a condition precedent to the founding of the jurisdiction of the Court of Appeal and that there was no power to treat it as a formality under section 266 of the Law.

At the time of this decision, section 11 (2) of the Judicature (Appellate Jurisdiction) Law, 1962, had provided that:

> "The time within which notice of appeal may be given or grounds of appeal may be filed, in relation to appeals under this section, may be extended at any time by the court."

This provision, however, had said nothing about the giving of security for costs and the Legislature, again unhappy at the Court's apparent intransigence, proceeded to amend the section, by section 3 of Act 12 of 1970, to read as follows:

> "Notwithstanding anything to the contrary, the time within which (a) notice of appeal may be given or served, (b) security for costs of the appeal and for the due and faithful performance of the judgment and orders of the Court of Appeal may be given, (c) grounds of appeal may be filed or served, in relation to appeals under this section, may upon application made in such manner as may be prescribed by the rules of the court, be extended by the court at any time."

But this amendment did not go far enough. It had said nothing about security for the due prosecution of the appeal. And so in Eric Christian v. Wesley Brown [1973] 12 J.L.R. 1039, the Court struck again. In this case oral notice of appeal had been given and minuted in open court at the time of pronouncing judgment but the sum required to be deposited as security for the due prosecution of the appeal was not then paid. The appellant therefore sought to remedy the omission by giving written notice of the appeal, well within the prescribed time for giving written notice, and deposited the required security simultaneously with the written notice. But notwithstanding that the deposit was made at the same time as the lodging of the written notice the Court held that the appeal could not be heard, thatt the omission to deposit the security at the time of giving the oral notice was fatal. In this

case, it does not appear that the case of Aarons v. Lindo was considered but in 1973, in Patterson and Nicely v. Samuel Lynch, 21 W.I.R. 378, this Court by a majority decision asserted that the decision in Aarons v. Lindo was wrong, that the deposit of security for the due prosecution of the appeal at the time of taking or lodging the appeal was a condition precedent to the jurisdiction of the Court of Appeal and that this Court had no power to re-set the time table regulating the conduct of appeal proceedings so as to enable the requirements to be complied with at a later date.

Thus was overruled, by a majority decision of 2 - 1, a decision that had been unchallenged for some 20 years and this view of the law as declared by the majority decision in the Patterson case appears to have prevailed up to the present time. (See Orett McNamee v. Greta Webb, R.M.C.A. No. 12/74 dated 21.6.74. George Nicholas v. Attorney General and Rexo Supermarket [1976] (30.4.76)).

The result of all this is, ironically, that the Court has so far adopted an even more illiberal construction of the law than prevailed before section 266 was introduced in 1894. And the view that has prevailed up to now would seem to render meaningless the provisions of section 266.

Apart from the strictures dealt with above, the Court has been equally illiberal in construing other aspects of the provisions relating to appeals. It has held in Rochester v. Chen and Matthews [1961] 4 W.I.R. 40 that the giving of notice of appeal is a condition precedent to the hearing of the appeal, the performance of which founds the jurisdiction of the Court of Appeal to hear the appeal, that it is not a formality and that therefore the Court had no power to enlarge the time for the service of the notice of appeal.

It is a little difficult to understand the logic of this decision. Here the notice of appeal was lodged in time. That is what gave the Court jurisdiction. And it certainly is a non-sequitur to say that failure to serve a copy of the notice of appeal on the opposite party within the prescribed time would necessarily deprive the Court of the jurisdiction which it got when the notice of appeal was lodged.

There seems to be some misconception as to the meaning of "formality" as used in section 256. One of the meanings of "formality" as given in the Concise Oxford Dictionary, is "conformity to rules" and it is clear from the amendment of 1936 (section 3 of Law 8 of 1936) that it is this meaning that is meant. And this being so, then it would seem that all the provisions of section 256 as to what an appellant should do on exercising his right of appeal constitute the rules with which he should conform if he wishes his appeal to be heard. And section 266 provides that if any of these rules shall have been inadvertently, or from ignorance or necessity omitted to be observed, it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance or necessity, and if the justice of the case shall appear so to require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from.

And indeed what else could possibly have been meant when section 266 begins by saying that "the provisions of this Act conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right?" And apart from the provisions of section 256, (and section 257 which is self-sufficient in itself) what else is there in the Act that could possibly be described as "formalities prescribed by this Act" and which are to be observed by an appellant?

With the exception of the case of Aarons v. Lindo, it appears that all the cases referred to above involved not a liberal but rather a very illiberal construction of the provisions of the Act relating to appeals and it is high time that an end be put to this illiberality. Fortunately, the Court is not without its redeeming features in this respect. There have been cases, albeit too few, in which the provisions of section 266 seem to have been fully appreciated and to have met with compliance.

For instance in Dunkeld Farms Ltd. v. Maisie Williams and Joseph Williams [1964] G.L.R. 226, the Court held that a written notice of appeal having been lodged in time, failure to serve a copy on the other party within the time prescribed was not fatal and the Court of Appeal had a discretion to grant an extension of time in which to do so, which it did.

It does not appear, however, that the attention of the Court was drawn to the contrary decision in Rochester v. Chin [1964] 4 W.I.R. 40. And the judgments in Patterson & Nicely v. Samuel Lynch [1973] 21 W.I.R. 378, and Orett McNamee v. Greta Webb - R.M.C.A. 12/74 (21.6.74) were not unanimous.

The fact of the matter is that section 251 of the Judicature (Resident Magistrates) Act confers a right of appeal in civil causes and matters. That right is given "subject to the provisions of the following sections." And the following sections set out, inter alia, the rules to be followed by a person desirous of exercising his right of appeal.

Firstly, he must bring his appeal. Section 256 provides that the appeal may be taken and minuted in open court at the time of pronouncing judgment. If this course has been adopted then the appeal has been brought. Now, having brought the appeal, he is required to do a number of things.

He is required, simultaneously with the bringing of his appeal, to deposit in Court the sum of one dollar as security for the due prosecution of the appeal that he has brought.

Secondly, he is required within 14 days after the taking of the appeal, to give security for costs etc. to the extent of $24.00. (After he has done these things, the Magistrate is required to draw up a statement of his reasons for judgment).

Thirdly, the appellant is required within 21 days after the day on which he received notice that the reasons for judgment have been lodged, to draw up and serve on the respondent and file with the Clerk of the Courts his grounds of appeal.

All these requirements are conditions precedent to the hearing of the appeal, not to the bringing of the appeal. These requirements do not fall to be undertaken before the appeal has been brought. And all these requirements constitute the rules with which the appellant is required to conform. They are regarded by the Law as the formalities to be observed by a person who has appealed, hence it is provided that if one of them, i.e. the drawing up, serving and filing of the grounds of appeal, is not

done within the time prescribed, his right to appeal shall cease and determine, but "subject to the provisions of section 266 which requires that "the provisions of this Act conferring a right of appeal shall be construed liberally in favour of such right" and that "in case any of the formalities" (of which the drawing up, serving and filing of the grounds of appeal is clearly one)"..... shall have been inadvertently, or from ignorance or necessity omitted to be observed, it shall be lawful for the Court of Appeal, if it appear that such omission has arisen from inadvertence, ignorance or necessity, and if the justice of the case shall appear so to require, with or without terms, to admit the appellant to impeach the judgment, order or proceedings appealed from."

One example of an omission that could have arisen from necessity is if the party whose appeal has been minuted in open court only had a $10.00 note and the court's officer in attendance could not find change, the court having sat late and the officer with the key to the safe having already left.

In a case where the appeal was not taken and minuted in open court at the time of pronouncing judgment, the same requirements apply except that a written notice of appeal must be lodged with the Clerk of the Courts within 14 days after the date of the judgment, and the appellant having thus appealed, is required, within the same period of 14 days, but not necessarily simultaneously with the lodging of the written notice of appeal, to serve a copy of his written notice upon the opposite party. And all these rules are subject to the provisions of section 266.

In the instant appeals, it is clear that the omissions complained of were primarily due to "ignorance" on the part of an officer of the R.M. Court, and as they have in fact all been now remedied, albeit out of the time prescribed, this Court will admit the appellants to impeach the judgment appealed from and in all the circumstances of this case, this Court will so admit the appellants without the imposition of any terms other than those normally applying to the hearing of appeals.