

President

JAMAICA

IN THE COURT OF APPEAL
H.M. CIVIL APPEAL NO. 87/63

JAMES GLENN

PLAINTIFF/APPELLANT

vs.

LENSFORD BROWN

DEFENDANT/RESPONDENT

BEFORE: The Hon. Mr. Justice Duffus - President
The Hon. Mr. Justice Henriques
The Hon. Mr. Justice Waddington

Mr. R. N. Henriques for the Plaintiff/Appellant
Mr. B. D. Carberry for the Defendant/Respondent

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THE PRESIDENT:

On this appeal coming on for hearing, a preliminary objection was taken on behalf of the respondent that notice of the appeal was served late.

The record showed that:-

- (1) Judgment was delivered on July 12, 1963;
- (2) Written notice of appeal was lodged with the Clerk of the Courts on July 26, 1963;
- (3) A copy of the notice of appeal was served on the respondent's Solicitor on August 30, 1963.

It was submitted on behalf of the respondent that this court had no jurisdiction to hear the appeal, the notice of appeal not having been served on him or his solicitor "within fourteen days after the date of the judgment" pursuant to the provisions of section 256 of the Judicature (Resident Magistrates) Law Cap. 179 and further that the court had no power to extend or enlarge the time. Learned Counsel for the respondent relied on the judgment of the former Court of Appeal in Rochester v. Chin & Matthews (1961) 4 W.I.R. 40 where a preliminary objection on exactly the same point was upheld, the court holding that service of the notice on the opposite party was not a formality and the provisions of section 256 had to be strictly complied with. That Court also decided that under the statutory provisions then in force it had no power to enlarge the time.

The present Court of Appeal was established by Section 103 of the Constitution of Jamaica and derives its jurisdiction and powers from the Judicature (Appellate Jurisdiction) Law, 1962, which came into operation on the 5th August, 1962. Section 11(1) of that law confers jurisdiction on the Court to hear appeals from any judgment, decree or order of a Resident Magistrate's Court in all civil proceedings, and sub-section (2) of the same section provides as follows:-

"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."

It was contended by learned counsel for the respondent that on a strict interpretation of this sub-section the Court's power to extend time was limited to the act of lodging a written notice of appeal with the Clerk of the Court and did not apply to the act of serving a copy of the notice upon the opposite party.

Learned counsel for the appellant submitted that the power of the Court to extend time applied not only to the lodging of the written notice of appeal with ^{the} Clerk of the Court but also to the serving of the copy upon the opposite party. He submitted that ^{the} words "The time within which notice of appeal may be given" in section 11(2) were wide enough to include both acts, that is, the lodging with the Clerk of the Court and the serving of the copy on the opposite party.

It is necessary to examine carefully the provisions of section 256 of Cap. 179 which sets out in detail the various steps which have to be taken by an appellant in order to perfect his appeal.

The first step is to give notice of the proposed appeal. The section states that "the appeal may be taken and minuted in open Court at the time of pronouncing judgment". If this is not done the section provides that "a written notice of appeal shall be lodged with the Clerk of the Court, and a copy of it shall be served upon the opposite party personally, or at his place of dwelling or upon his solicitor, within fourteen days after the date of the judgment;"

Provision is then made for the deposit in court of ten shillings as security for the due prosecution of the appeal and for the giving of security to the extent of ten pounds for the payment of any costs that may be awarded against the appellant and for the performance of the judgment and orders of the Court of Appeal. The section then proceeds to deal with stay of proceedings on the judgment and makes provision for the Resident Magistrate drawing up a statement of his reasons for the judgment appealed against. Twenty-one days after receiving notice that the Resident Magistrate's reasons have been lodged with the Clerk of the Court, the appellant must serve on the respondent and file with the Clerk of the Court his grounds of appeal, and if he fails to do so his right of appeal, subject to the provisions of section 266 which gives the Court of Appeal power to grant relief, is determined.

The penultimate paragraph of section 256 then provides:-

"If the appellant after giving notice of appeal and giving security as aforesaid, fails to prosecute the appeal, he shall forfeit as a court fee the sum of ten shillings deposited as aforesaid."

It is to be noted that the words used here are "giving notice of appeal" whereas the earlier part of the section which deals with notice uses the words "lodged" and "served" in respect of the two separate acts which must be performed by the appellant, if the appeal is not taken and minuted in open court at the time of pronouncing judgment.

It is my view therefore that the giving of the notice of appeal was clearly intended by the legislature to include both acts, that is, the lodging with the Clerk of the Court and the serving of the copy of the notice on the opposite party. This being so section 11(2) ^{of the Judicature (Appellate Jurisdiction) Law, 1962} clearly confers on this court the power to extend the time for serving the copy of the notice of appeal upon the opposite party. As was pointed out in Rochester v. Chin the former Court of Appeal did not have this power, but, as section 11(2) of the Judicature (Appellate Jurisdiction) Law, 1962, has

conferred the power on this Court the decision in Rochester v. Chin is now only of academic interest.

The preliminary objection must therefore fail and I would extend the time for the service of the copy of the notice on the respondent, on application being made and on being satisfied that no prejudice or injustice will result to the respondent.

PRESIDENT.

I agree.

J.A.

MR. JUSTICE HENRIQUES:

I am indebted to Learned Counsel on both sides for the brief and pertinent arguments which they have advanced on the short point at issue. Learned Counsel for the respondent has submitted that the provisions of Section 256 of the Judicature (Resident Magistrates) Law has not been complied with, and furthermore that sub-section (2) of Section 11 of the Judicature (Appellate Jurisdiction) Law, 1962, Law 15 of 1962, should be strictly construed as to limit the power of the Court to extend time solely to the act of lodging a written notice of appeal with the Clerk of Court, and not to the service of a copy of the notice on the opposite party or parties.

Learned Counsel for the appellant, on the other hand, concedes that section 256 of Cap. 179 has not been complied with so far as the service of the notice is concerned, but urges that section 11(2) of Law 15 of 1962 should be so construed as to apply to the act of service as well as to that of lodgment.

It seems to me that the effect of section 256 of Cap. 179 is that notice of appeal must be given -

- (a) to the Clerk of Resident Magistrates's Court, and
- (b) to the opposite party or parties.

In the case of a verbal notice of appeal in court - this is effected at one and the same time as the Clerk of Court minutes it, and the opposite party is deemed to hear it. Where a party however, desires to appeal after the case has been disposed of in Court, he must do so by means of lodging a written notice of appeal with the Clerk of Court and serving a copy of the notice upon the opposite party. Both these acts are essential requirements and must be done within the prescribed time. But the requirements are separate in the same way as the giving of security is separate.

Section 11(2) of the Judicature (Appellate Jurisdiction) Law, 1962, gives power to the Court to extend the time within which notice of appeal may be given. In my view, the proper construction to be placed to this section should be "may be given

to any person to whom it is required to be given." The power therefore applies in respect of each requirement -

- (a) notice of appeal to the Clerk of Court
- (b) copy of notice to the opposite party.

In the instant case a notice of appeal has been lodged with the Clerk of Court within the prescribed time, but service on the opposite party has been late. The Court therefore has, in my view, power to extend the time for service on the opposite party. Unfortunately, there is no material before the Court which explains the failure of the appellant to comply with the provisions of section 256 of Cap. 179. Nevertheless I would be disposed to grant an extension of time for service of a copy of the notice of appeal on application being made provided I am satisfied then that no prejudice or injustice would accrue to the defendant-respondent by my so doing.

J.A.