

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 24/71

BEFORE: The Hon. President *Fox*
 The Hon. Mr. Justice ~~Graham Perkins~~
 The Hon. Mr. Justice Robinson (Ag.)

BETWEEN	JANNIE C. RICKETTS) RUPERT J. KELLY) DAPHNE DAVIS) INA URQUHART HYLTON) STENNETT URQUHART)	- DEFENDANTS/ APPELLANTS
AND	BARCLAYS BANK D.C.O.) and) MARIAN URQUHART)	- PLAINTIFFS/ RESPONDENTS

Mr. Bentley Brown for defendants/appellants.

Dr. Lloyd Barnett for plaintiffs/respondents.

19TH MAY, 1972

FOX, J.A.:

When this motion (notice of which was filed on 24th April, 1972) for further extension of time within which to file the record of appeal was called on before the Court, Dr. Lloyd Barnett, who appeared on behalf of the plaintiffs/respondents took the preliminary point that the motion was not competent by virtue of a previous order of the Court made on the 10th of March, 1972, whereunder, in the event which had transpired since that order was made, the appeal had ceased and determined, and the action was at an end.

Dr. Barnett adverted the Court's attention to the circumstances under which that previous order of the Court on the 10th day of March, 1972, was made. On that date the Court had before it two motions,

/ (1) a motion

- (1) a motion filed by the plaintiffs/respondents on the 10th day of February, 1972 to dismiss the appeal for want of prosecution;
- (2) a motion filed by the defendants/appellants on 1st March, 1972, applying for an extension of time within which to file the record.

Following upon the proceedings before the Court on the 10th of March, 1972, when Mr. Bentley Brown and Dr. Lloyd Barnett were both heard, the Court ordered that,

" the time within which the record of appeal together with four copies thereof and affidavit of service of notice of appeal, or acknowledgment of service shall be filed shall be extended to six weeks from the date of this order, failing which the appeal shall cease and determine."

In compliance with that order, the record of appeal should have been filed on or before the 21st of April, 1972. This had not happened. As a consequence, so reasoned Dr. Barnett, the appeal had been dismissed, and could not now be revived.

In my view, these submissions are valid, and must be upheld. The power of this Court to enlarge or abridge the time appointed by the Court of Appeal Rules 1962, is described in Rule 9. That Rule specifically provides that the Court shall have power to enlarge or abridge time "upon such terms (if any) as the justice of the case may require" On 10th of March, 1972, the Court ordered that upon failure to file the record within the extended time granted "the appeal shall cease and determine". This was a term which could properly and validly be attached to the order for extension of time.

The record was not filed within the time extended by the Court on 10th of March. As a consequence, the appeal stood dismissed as of the date following the expiration of that time.

/Mr. Bentley Brown

Mr. Bentley Brown contended that having regard to the liberty to apply which was contained in the Court's order of the 10th of March, 1972, the present application was competent. This submission proceeds from a misconception of the effect of the Court's order. The liberty which was given to apply should have been exercised before the direction for the cessation of the appeal came into effect and not after that time.

Mr. Brown referred to the provisions of Rule 32 (2) whereby:

"an appellant, whose appeal has been dismissed under this rule may apply by a notice of motion that his appeal be restored and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit."

Mr. Brown contended that this rule showed that the appeal had not ceased and determined for all time, but could be restored following upon an application under Rule 32(2). Consequently, so he argued, if on an application to restore the appeal merit would be apparent, the Court could on that basis grant the present application for extension of time within which to file the record.

This submission also misconceives the realities of the position. The appeal stands dismissed as a consequence of a term attached to an order on an application for extension of time. The term was attached by virtue of Rule 9. The appeal is therefore dismissed as a consequence of an order of the Court made pursuant to Rule 9, and not as a result of an application under Rule 32 (1). Rule 32 (2) is therefore of no relevance. The motion should be dismissed.

/Henriques, P.....

HENRIQUES, P.:

I agree that the preliminary objection should be upheld and the motion dismissed.

ROBINSON, J.A.(AG.):

I agree with the decision of the learned President and Mr. Justice Fox. I was a member of the Court on the 10th of March, when the order of that date was made, granting an extension of time to file the record, and upon failure the appeal shall cease and determine.

This order was made in respect of two applications, namely, an application to dismiss for want of prosecution and the order to extend time. Both applications were before the Court; the record had not been filed within the extended time, and the appeal therefore must cease and determine, and be dismissed.