

J A M A I C A

IN THE COURT OF APPEAL

R.M. COURTS CIVIL APPEAL No. 91/64

BEFORE: The Hon. Mr. Justice Henriques, Presiding
The Hon. Mr. Justice Moody
The Hon. Mr. Justice Shelley (Acting)

BETWEEN URIEL BROWN - PLAINTIFF/APPELLANT

A N D DET. CPL. NEMBARD - DEFENDANTS/RESPONDENTS
and
DET. GIBSON

Mr. Emil George for Plaintiff/Appellant
Mr. A. C. Mundell for Defendants/Respondents

20th April, 1966.

HENRIQUES, J.A.,

This is an application to relist a civil appeal from the Resident Magistrate's Court which was dismissed on the 26th day of November, last year, for want of appearance on behalf of the appellant.

The application is supported by an affidavit from the Solicitor for the appellant dated the 23rd of February, 1966. Paragraph 3 of which is to the following effect -

"I checked with the Appellate Court on the 11th of January, 1965, and was informed that when this appeal was set down for hearing I would have been notified, and apart from this promise, and knowing that it is usual that a notice would have been sent to me when this appeal was put on the Cause List, I did not make any further enquiries, nor did I keep checking the Court list. It has now been brought to my attention that the appeal was heard on the 26th of November, 1965,

/ and....

and that it was dismissed."

Paragraph 4 is to this effect -

"At no time have I ever received notification that this appeal was set down for hearing, and I am informed and verily doth believe that notification of the hearing of this appeal was sent to Dayes, Rickards and Nash, which firm had been out of existence for many years."

It is submitted on the authority of Palmer and Vernon decided in 4 J.L.R. p. 103, that the affidavit discloses a good and sufficient reason for this Court exercising the power which it has, namely, to re-list an appeal which has been dismissed not on its merit.

The application is opposed on the grounds, first of all, that no good and sufficient reasons have been shown in accordance with the decision of Palmer & Vernon, and secondly, that Rule 36 of the Court of Appeal Rules 1962 is applicable to this case. According to that Rule, sub-section 2 of which reads:-

"When an appeal has been struck out or dismissed owing to non appearance of the appellant the Court may on application by the appellant by Notice of Motion supported by an Affidavit if it thinks fit, and on such terms as to cost or otherwise as it may deem just direct the appeal to be entered for hearing, provided that no application under this paragraph shall be made after the expiration of twenty-one days from the date of the judgment or order to be set aside,"

and reference has been made to Rule 25 of the Court of Appeal Rules 1962, which according to the submission made brings

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an appeal from the Resident Magistrate's Court within the ambit of Rule 36 which appears under the Title which deals with appeals from the Supreme Court.

It is therefore, submitted that the appeal having been dismissed on the 26th of November, 1965, and it is only in February, 1966 that an application was filed to re-list it, that therefore, it is caught by the proviso to sub-section 2 of Rule 36.

I have considered the submissions made, and I have come to the conclusion that Rule 36 is applicable only to Supreme Court appeals. I have further considered the merits of the application which has been made to us. It seems to me that a genuine misunderstanding occurred in this case. The Registrar, or his Department informed the Solicitor that he would be notified when the appeal was set down for hearing. Subsequently, a notice was sent but instead of being sent to the Solicitor concerned it was sent to a firm, of which he had been a partner and which had ceased to exist for many years.

In the circumstances, I think in accordance with the decision of Palmer & Vernon that there is good and sufficient reason why the Court should exercise the discretion which it has and order the appeal to be re-listed. In the circumstances, I would order the appeal to be re-listed.

MOODY, J.A.,

I agree.

SHELLEY, J.A. (Acting),

So do I.

HENRIQUES, J.A.,

The appeal will be re-listed. Costs in the cause.