

1979 June 8

[TRIANTAFYLIDIS, P. DEMETRIADES AND SAVVIDES JJ.]

VALENTINOS HARAKIS,

Appellant-Defendant,

v.

TANNOUS K. FEGHALI,

Respondent-Plaintiff.

(Civil Appeal No. 5736).

Civil Procedure—Appeal—Want of prosecution—Rules 6, 21 and 22 of Order 35 of the Civil Procedure Rules—Provisions of rule 22 mandatory and come into operation without the need to take any specific step for that purpose—Appeal stands dismissed ever since the period of three months, after its lodging, expires—Action taken by registry, asking compliance with above rules, after the expiry of the said period, cannot alter the legal position.

Rules 21 and 22 of Order 35 of the Civil Procedure Rules read a follows:

“ 21. If the appellant does not, within one month of lodging his notice of appeal, apply for copies and make a deposit as provided in rule 6 of this Order, the appeal may be dismissed on the application of any party. Such application may be made *ex parte*, but the Court of Appeal may direct notice to be given to such of the other parties or persons affected by the appeal as it may deem fit.

22. If the appellant does not, within three months of lodging his notice of appeal, take the steps mentioned in rule 21 of this Order, the appeal shall stand dismissed, but it may, if the Court of Appeal so deems fit, be reinstated upon such terms as may be just.”

The above appeal was filed on July, 15, 1977 and it was common ground that the appellant did not take, within three months of lodging his notice of appeal, the steps mentioned in rule 21, above. On November 10, 1977 long after the expiry of the three months' period prescribed by means of rule 22, the Registry of the Supreme Court addressed a letter* to counsel for the appel-

lant, with copy to counsel for the respondent, asking him to comply with the provisions of the above rules. Counsel for the appellant did comply with the above letter and the appeal was fixed for hearing on June 5, 1979.

Upon a preliminary objection, raised by counsel for the respondent, that the appeal should be treated as having stood dismissed ever since the period specified in rule 22 of Order 35 expired after the filing of the appeal on July, 15, 1977:

Held, (1) that whatever action was taken by the Registry administratively, in a routine way, cannot alter the legal position which crystallized when, after the expiry of the three months' period prescribed by rule 22 of Order 35, this appeal came to stand dismissed by virtue of the application of rule 22.

(2) That the provisions of rule 22 are of a mandatory nature and, therefore, they come into operation without the need to take any specific step for that purpose; that, consequently, this appeal stands dismissed ever since the period of three months, after it was lodged on July 15, 1977, has expired; and that, accordingly, the preliminary objection must be sustained.

Objection sustained.

Observation: In view of the true effect of rule 22 of Order 35, the Registry of this Court should not take any step, in relation to an appeal which stands dismissed by operation of that rule, other than to certify that it does stand dismissed

Cases referred to:

- Kyriacou v. Georghiadou* (1970) 1 C.L.R. 145 at p. 147;
Ibrahim v. Kasab (1972) 1 C.L.R. 16 at p. 17;
HjiPanayi v. HjiPanayi (1974) 1 C.L.R. 60.

Preliminary objection.

Preliminary objection raised by counsel of the respondent that the appeal should be treated as having stood dismissed ever since the period specified in rule 22 of Order 35 of the Civil Procedure Rules expired after the filing of the appeal on July 15, 1977.

B. Vassiliades, for the appellant.

L. Papaphilippou, for the respondent.

* See the letter at p. 296 post.

5 TRIANTAFYLIDIS P. gave the following judgment of the Court. At the commencement of the hearing of this appeal counsel for the respondent raised the preliminary objection that this appeal should be treated as having stood dismissed ever since the period specified in rule 22 of Order 35 of the Civil Procedure Rules expired after the filing of this appeal on July 15, 1977.

Rules 21 and 22 of Order 35 of the said Rules read as follows:

10 " 21. If the appellant does not, within one month of lodging his notice of appeal, apply for copies and make a deposit as provided in rule 6 of this Order, the appeal may be dismissed on the application of any party. Such application may be made *ex parte*, but the Court of Appeal may direct notice to be given to such of the other parties or persons affected by the appeal as it may deem fit.

15 22. If the appellant does not, within three months of lodging his notice of appeal, take the steps mentioned in rule 21 of this Order, the appeal shall stand dismissed, but it may, if the Court of Appeal so deems fit, be reinstated upon such terms as may be just."

20 It is common ground that the appellant did not take, within three months of lodging his notice of appeal in the present case, the steps mentioned in rule 21, above.

25 In our view, the provisions of rule 22 are of a mandatory nature and, therefore, they come into operation without the need to take any specific step for that purpose; consequently, we agree with counsel for the respondent that this appeal stands dismissed ever since the period of three months, after it was lodged on July 15, 1977, has expired; whether or not it should be reinstated is a matter which we have to examine if, and when, the appellant applies in this connection.

30 It should be recalled that in *Kyriacou v. Georghiadou*, (1970) 1 C.L.R. 145, it was stressed by Josephides J. (at p. 147):-

35 " It is in the public interest that there should be some end to litigation, and the stipulations as to time in procedural matters laid down in the Rules of Court are to be observed unless justice clearly indicates that they should be relaxed: cf. *Loizou v. Konteatis* (1968) 1 C.L.R. 291, at page 294; *Georghiou v. Republic (Minister of Interior and Another*

(1968) 1 C.L.R. 411; and *Edwards v. Edwards* [1968] 1 W.L.R. 149.”

The above view was affirmed in *Ibrahim v. Kasab*, (1972) 1 C.L.R. 16, 17. The cases of *Kyriacou* and *Ibrahim, supra*, as well as the case of *Hji Panayi v. Hji Panayi*, (1974) 1 C.L.R. 60, were all cases in which, after the dismissal of appeals, under rule 22 of Order 35 of the Civil Procedure Rules, applications were made for reinstatement of the appeals concerned, but they do afford quite useful guidance about the nature of the significance of the said rule 22.

It is quite correct that, in the present case, long after the expiry of the three months' period prescribed by means of rule 22, our Registry addressed, on November 10, 1977, to counsel for the appellant, with copy to counsel for the respondent, the following letter:—

“ With reference to Order 35 rules 6, 21 and 22 of the Civil Procedure Rules, you are requested to comply with the provisions of the Rules and lodge in this Court the sum of £ 3.—for the preparation of the record of the proceedings consisting of 11,900 words, if you wish to have the appeal fixed for hearing.”

The delay on the part of our Registry to write the above letter was due to the fact that the copy of the record of the appeal was forwarded to our Registry by the trial Court rather belatedly, on October 21, 1977, and was received on October 26, 1977.

Very soon afterwards, on November 11, 1977, counsel for the respondent applied *ex parte* that the appeal be dismissed on the ground that the appellant failed to comply with rule 21 of Order 35 of the Civil Procedure Rules; but this application was, indeed, superfluous as the appeal at the time stood dismissed under rule 22 of the same Rules.

Because, however, of the letter of November 10, 1977, counsel for the appellant paid the fee of £ 3 and obtained a copy of the record of the appeal on November 12, 1977; and, then, on March 28, 1979, our Registry notified the parties that this appeal was fixed for hearing on June 5, 1979.

But whatever action was taken, as above, by our Registry

administratively, in a routine way, cannot alter the legal position which crystallized when, after the expiry of the three months' period prescribed by rule 22 of Order 35, this appeal came to stand dismissed by virtue of the application of rule 22.

5 It is to be noted that a letter such as that which was sent by our Registry on November 10, 1977, to the appellant in the present case, was, also, addressed to the appellant in the *Kyriacou* case, *supra*, as well as in the *Ibrahim* and in the *Hji Panayi* case, *supra*. But, in all those instances that letter was
10 sent within the period of three months prescribed under rule 22 of Order 35, and not after the expiry of such period, as in the present case.

We would like to conclude by observing that, in view of the true effect of rule 22 of Order 35, the Registry of this Court
15 should not take any step in relation to an appeal which stands dismissed by operation of that rule, other than to certify that it does stand dismissed.

In the result, the preliminary objection of counsel for the respondent is sustained and this appeal is treated as having stood
20 dismissed ever since the expiry of the period prescribed under the said rule 22.

The costs of the respondent in this appeal are awarded to him against the appellant.

Preliminary objection sustained.

Order for costs as above.

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