

1984 September 13

[MALACHTOS, LORIS AND STYLIANIDES, JJ.]

GEORGHIOS SAMANIS,

Appellant-Defendant,

v.

IOANNIS SYMILLIDES,

Respondent-Plaintiff.

(Civil Appeal No. 6666).

5 *Civil Procedure—Appeal—Extension of time within which to
appeal—Order 35, rules 2 and 3 of the Civil Procedure
Rules—Discretion of the Court—If grounds of appeal can-
not be formulated without the record of proceedings appli-
cation for extension has to be made before the expiration
of the time limit prescribed by the Rules—Photocopy of
judgment handed to Counsel before expiration of time limit
—He could file notice of appeal since he was personally
conducting the case before the trial Court—“Office copy”
10 of the judgment in the above rule 3—Not a drawn up
judgment.*

On the 30th June, 1983 judgment was given by the District Court of Limassol, after full hearing against the defendant for the sum of £2,400.- arrears of rent.

15 On the 1st July, 1983 Counsel for the defendant applied to the Registrar of the District Court of Limassol for the preparation of the record of proceedings for purposes of appeal; and on the 4th August, 1983 a photocopy of the judgment, in the handwriting of the trial Judge, was delivered to him.
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On the 13th August, 1983, two days after the expiry of the time limit within which to appeal, the defendant applied for extension of the time within which to appeal. The trial Judge dismissed the application having held, inter alia,
25 that the proper course would have been for the applicant

to file an application for extension of time before its expiry. Hence this appeal.

Counsel for the appellant mainly contended that the trial Judge failed to consider that his application for extension of time was not based only on Order 35, rule 2, but also on rule 3 as well; and that although he applied immediately after the issue of the judgment for a copy of the record of proceedings and an office copy of the judgment, no such copies were delivered to him; and that in view of the fact that an office copy of the judgment is required under Order 35, rule 3, to be filed together with the Notice of Appeal, he could not file the Notice of Appeal as it would not be accepted by the Registry without being accompanied by a drawn up judgment. 5 10

Held, (1) that no doubt, according to Order 35, rule 3, an office copy of the judgment or order appealed from is required to be filed together with the Notice of Appeal; that, however, this provision does not speak about a drawn up judgment or order but an office copy of such judgment or order; that since a photo copy of the judgment was given to counsel for the appellant seven days before the expiration of the six weeks time appointed by the rules, he could easily have filed the Notice of Appeal in time as he was personally conducting the case before the trial Court and had a first hand knowledge of the facts. 15 20 25

(2) That the power of the Courts to extend the time prescribed by the Rules of Procedure to file an appeal is discretionary and depends on the facts of the particular case; that counsel for the appellant failed to satisfy this Court that the trial Judge in exercising his discretion erred in any way, but, on the contrary, having gone through the record of proceedings, this Court is in agreement with the approach of the trial Judge in that, if counsel for the appellant felt that he could not formulate the grounds of appeal without the record of proceedings he had to apply for extension of time prior to the expiration of the time limit prescribed by the rules; accordingly the appeal must be dismissed. 30 35

Appeal dismissed.

Cases referred to:

Cyprian Seaways Agencies Ltd. v. Republic (1981) 3
C.L.R. 271.

Appeal.

5 Appeal by defendant 1 against the order of the District Court of Limassol (Eleftheriou, D.J.) dated the 7th January, 1984 (Action No. 2257/80) whereby his application for extension of time within which to file an appeal was dismissed.

10 *C. M. HjiPieras*, for the appellant.

St. Houry (Mrs.) for the respondent.

MALACHTOS J. read the following judgment of the Court. This is an appeal by Defendant 1 in Action No. 2257/80 of the District Court of Limassol against the
15 judgment of a district Judge, where his application for extension of time to file an appeal in the above action was dismissed with costs.

The facts of the case which gave rise to the present litigation, shortly put, are the following.

20 On the 30th June, 1983, judgment was issued after full hearing in the above action against defendant 1 and his guarantor, defendant 2, jointly and severally in favour of the plaintiff-respondent in this appeal, for the sum of £2,400.- arrears of rent due on a contract of lease, and
25 also for the sum of £119.540 mils against defendant 1 only for goods sold and delivered to him. A counterclaim for £4,000.- by defendant 1 against the plaintiff was dismissed. The Court also adjudged costs in favour of the plaintiff.

30 On the 1st July, 1983, counsel for the defendants wrote the following letter to the Registrar of the District Court of Limassol:

35 "Please prepare as soon as possible at out expense, the record of proceedings and, mainly, the judgment of the Court in the above action for purposes of appeal."

As it appears from the record of proceedings, no further step was taken by counsel for the defendants till the 8th of August, 1983, when he addressed the following letter to the Registrar of the District Court:

“Following my letter dated 1st July, 1983, for the preparation of the judgment of the Court dated 30th June, 1983, I inform you as follows: 5

(a) if I haven't got the judgment, it is under the circumstances, impossible to prepare and file the appeal; 10

(b) the photo copy of the judgment was of no help as the handwriting is illegible;

(c) I refuse to accept the theory that by this way, indirectly will be bypassed the right of the litigant to file an appeal; 15

(d) Please have the judgment ready on 10th August, 1983”.

As it appears from the above letter a photo copy of the reasoned judgment of the trial Judge was delivered to counsel for the defendants prior to 8th August, 1983. In fact, this photo copy was delivered to him on 4th August, 1983. 20

On 11th August, 1983, counsel for the defendants wrote another letter to the Registrar of the Court. This letter is as follows: 25

“I protest because, although today is the last day for the filing of the appeal, yet, up to the present moment the judgment of the Judge has not been delivered to me.

It has been said that the delay is due to the absence on leave of the Judge and that the matter would be settled on 10th August, 1983, when the judge was expected to return. On 10th August, 1983, you informed me that the ‘Judge’ was granted extension of his leave for one day and returns tomorrow. 30 35

Inspite of my efforts, it has not been possible to

prepare the appeal, as substantial elements and particulars are contained in the judgment which, however, I haven't got.

5 I shall wait for the judgment to be given to me in order to submit an application for extension of time to file the appeal."

10 On the 13th August, 1983, counsel for the defendants filed on behalf of defendant No. 1 application for extension of time which, as stated therein, was based on Order 35, rules 2 and 3 and Order 57, rule 2 of the Civil Procedure Rules, which reads as follows:

"Order 35, rules 2 and 3:

15 2. Subject and without prejudice to the power of the Court of Appeal under Order 57, rule 2, no appeal from any interlocutory order, or from an order, whether final or interlocutory, in any matter not being an action, shall be brought after the expiration of fourteen days, and no other appeal shall be brought after the expiration of six weeks, unless the
20 Court or Judge, at the time of making the order or at any time subsequently, or the Court of Appeal shall enlarge the time. The said respective periods shall be calculated from the time that the judgment or order becomes binding on the intending appellant, or in the case of the refusal of an application, from
25 the date of such refusal. Such deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed under special circumstances by the Court of Appeal.

30 3. All appeals shall be by way of rehearing and shall be brought by written notice of appeal filed, within the appropriate period prescribed by rule 2 of this Order, with the Registrar of the Court appealed from, together with an office copy of the judgment or
35 order complained of (Form 28)."

"Order 57, rule 2:

2. A Court or Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed

by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these rules or by any direction or order of the Court or Judge, the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or Judge shall otherwise order." 5 10

At the hearing of the application, which took place before another Judge than the one who tried the action, counsel for the parties addressed the Court and adduced no oral evidence relying only on the affidavits in support of the application and opposition. 15

The trial Judge after making extensive reference to the relevant Case Law, both in England and in Cyprus, made particular reference to the case of *Cyprian Seaways Agencies Ltd. v. The Republic*, (1981) 3 C.L.R. page 271, where all the relevant authorities were reviewed and in dismissing the application, at pages 54 and 55 of the record, said the following: 20 25

"When I turn to consider the facts of the instant case in the light of the authorities, I find myself faced, in the first place with the circumstance that the application was made two days after the expiry of the time limit. However the application cannot be considered with reference to any one such circumstance only, but rather in relation to all the circumstances in order that the discretion may be fully informed in its exercise, and, as the cases show, even in the event of a small delay good cause for granting an extension must be shown over and above the mere length of the delay itself. As regards the length of the delay, I would, rather, put it thus: the larger the delay the more cogent the reasons for justifying it must be, but even a small delay has to be suffi- 30 35 40

ciently justified. There is no doubt that the applicant's advocate was anxious in having the judgment drawn up and as matter of fact a photo copy of the judgment was secured by the applicant's advocate prior to the expiration of the time limit. I admit that the handwriting of the learned trial Judge is illegible but with some effort the photo copied judgment could be persued. In any case, if it was felt that the time left for adequately preparing and filing an appeal was insufficient, the proper course, as followed in the *Turkish Co- Operative Carob Marketing Society Ltd.* and indicated in *Cyprian Seaway Agencies Ltd. and other*, would have been for the applicant to file an application for extension of time before its expiry. Furthermore as stressed in the above cases, it is desirable that the application should be accompanied by a copy of the grounds of appeal, which was not done here, though I would not place any significance on this factor in the instant case.

In the end, though I have tried to read the facts as favourably to the applicant as I can in order to give him, if possible, the benefit of an extension seeing that the application was made shortly after the expiry of the time limit, I have reached the conclusion that in the light of the authorities this is not a proper case in which to exercise my discretion in favour of granting an extension. I must point out that, although the discretion of the Court is wide and free, it is not lightly to be exercised and that I fail to find any exceptional circumstances, on the facts as alleged, warranting its exercise so as to grant an extension as was the case with all the authorities in which an extension was granted. I am, consequently, not prepared, as at present advised, to disturb the vested interest which the respondent has acquired in the judgment or the public interest in the timely finality of adjudication."

Counsel for the appellant in arguing this appeal today before as, relied only on the ground that the trial Judge failed to consider that his application for extension of time was not based only on Order 35, rule 2, but also on

rule 3 as well. His complaint is that, although he applied immediately after the issue of the judgment for a copy of the record of proceedings and an office copy of the judgment, no such copies were delivered to him. In view of the fact, as he put it, that an office copy of the judgment is required under Order 35, rule 3, to be filed together with the Notice of Appeal, he could not file the Notice of Appeal as it would not be accepted by the Registry without being accompanied by a drawn up judgment. 5

The non filing of the Notice of Appeal in time, according to his submission, was entirely due to the delay of the Registry of the Court. 10

No doubt, according to Order 35, rule 3, an office copy of the judgment or order appealed from is required to be filed together with the Notice of Appeal. However, this provision does not speak about a drawn up judgment or order but an office copy of such judgment or order. 15

In the present case, since a photo copy of the judgment was given to counsel for the appellant seven days before the expiration of the six weeks time appointed by the rules, he could easily have filed the Notice of Appeal in time as he was personally conducting the case before the trial Court and had a first hand knowledge of the facts. 20

It is well settled that the power of the Courts to extend the time prescribed by the Rules of Procedure to file an appeal is discretionary and depends on the facts of the particular case. In the case in hand the trial Judge, after taking all factors into account, decided not to grant the extension of time applied for. 25

We must say that counsel for the appellant failed to satisfy us that the trial Judge in exercising his discretion erred in any way, but, on the contrary, having gone through the record of proceedings, we are in agreement with the approach of the trial Judge in that, if counsel for the appellant felt that he could not formulate the grounds of appeal without the record of proceedings he had to apply for extension of time prior to the expiration of the time limit prescribed by the rules. 30
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For the reasons stated above, this appeal fails and is dismissed with costs.

*Appeal dismissed
with costs.*