

1989 March 31

(SAVVIDES, HADJITSANGARIS, BOYADJIS, JJ.)

PANAYIOTA ANDREA LOIZIDE, WIFE OF SAVVAS MICHAEL  
AND ANOTHER,

*Appellants-Defendants,*

v.

PANAYIOTA FIAKOU,

*Respondent-Plaintiff.*

*(Civil Appeal No. 7742).*

*Appeal — Dismissal of, by reason of non-compliance with Rule 22 of 0.35 of the Civil Procedure Rules — The time limit is of a mandatory nature — The fact that after its expiration Registrar requested compliance with Rules 6, 21 and 22 of 0.35 does not save the appeal — Therefore, the fact that such notice did not come to the attention of counsel by reason of a mistake of his clerk is not a ground for reinstating the appeal.* 5

*Civil Procedure — Appeal — Reinstatement of Appeal which had been dismissed for non compliance with Rule 22 of 0.35 of the Civil Procedure Rules — Review of authorities — 0.33, rules 1 and 5 and 0.65, rule 11 are irrelevant.* 10

The facts of this case appear sufficiently from the hereinabove headnote.

*Application dismissed.*

*Cases referred to:*

*Kyriacou v. Georghiadou* (1970) 1 C.L.R. 145; 15

*Ibrahim v. Kasab* (1972) 1 C.L.R. 16;

*HjiPanayi v. HjiPanayi* (1974) 1 C.L.R. 60;

*Harakis v. Feghali* (1979) 1 C.L.R. 293.

**Application.**

Application by appellant for the reinstatement of the appeal 20

which has been dismissed under rule 22 of Order 35 of the Civil Procedure Rules.

*N. Papamiltiadous*, for the appellants.

*M. Charalambides*, for the respondents.

- 5 SAVVIDES J. gave the following decision of the Court. By the present application the applicants, who are the appellants in Civil Appeal No. 7742, which was dismissed on 31.1.1989 under rule 22 of Order 35 of the Civil Procedure Rules, seeks the reinstatement by us of such appeal, in the exercise of our  
10 discretionary powers under the said rule.

The appeal was filed against the judgment of a judge of the District Court of Nicosia in Action No. 7631/83 of the District Court of Nicosia, whereby judgment was given in favour of the respondent/plaintiff against the applicants and their counterclaim  
15 was dismissed.

The facts relevant to the present application are briefly as follows:-

Counsel for the appellants filed the above appeal on 26 July, 1988, but he failed within one month of lodging his notice of  
20 appeal, to apply for copies and make a deposit as provided in Rules 6 and 21 of Order 35 of the Civil Procedure Rules. Long after the expiry of the said period and in fact on 24.10.1988 the Registry addressed to counsel for the appellants, with copy to counsel for the respondent, the following letter:-

25 «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 £10.- subject to increase or return of any surplus for the preparation of the record of the proceedings, if you wish to  
30 have the appeal fixed for hearing».

Counsel for appellants failed to take any steps in furtherance of the appeal and counsel for respondent on 24.12.1988 filed an application for the dismissal of the appeal for failure of the appellants to comply with the relevant provisions in the Rules. The  
35 application was granted and the appeal was dismissed accordingly. Subsequently, counsel for the appellants filed the present application for the reinstatement of the appeal.

The grounds relied upon as set out in the affidavit sworn by a clerk of counsel for the appellants, which accompany the application, are that the letter of the Registrar was received by him but by oversight he failed to inform counsel of the receipt of such a notice. 5

The application is based on Order 33. Rules 1 and 5, Order 35, rules 21 and 22, Order 65, rule 11, of the Civil Procedure Rules.

The provisions of Orders 33 and 65 of the Civil Procedure Rules are entirely irrelevant and have no bearing at all in the present case. Both such Orders refer to proceedings before a district court in the exercise of first-instance jurisdiction and have nothing to do with the procedure on appeal which is regulated by Order 35 of the Civil Procedure Rules. 10

The relevant rules in the present case are rules 21 and 22 of Order 35, which provide as follows:- 15

«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. 20

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». 25

Rule 22 gives a discretion to the Court «if it deems fit» to reinstate an appeal upon such terms as may be just.

Rules 21 and 22 of Order 35 have been judicially considered by our Supreme Court in a series of cases. In *Kyriacou v. Georghiadou* (1970) 1 C.L.R. 145, the Court of Appeal after concluding that the appellant failed to show cause why the discretion of the Court should be exercised in his favour to have his appeal reinstated, stressed the following (per 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 followed in *Ibrahim v. Kasab* (1972) 1 C.L.R. 16, 17. *Hji Panayi v. Hji Panayi* (1974) 1 C.L.R. 60 and *Harakis v. Feghali* (1979) 1 C.L.R. 293. The cases of *Ibrahim* and *Hji Panayi* (supra), were cases in which, as in the case of *Kyriacou* (supra) after the dismissal of appeals under rule 22 of Order 35 applications were made for reinstatement of the appeals concerned. In *Harakis v. Feghali* (supra), long after the expiry of the three months' period prescribed by rule 22, the Registry of the Court addressed a letter to counsel for the appellant, with copy to counsel for the respondent, requesting him to comply with the provisions of the rules and lodge the amount required for the preparation of the record of the proceedings if he wished to have the appeal fixed for hearing. Counsel for the appellant complied with such request and the appeal was fixed for hearing. At the hearing of the appeal counsel for the respondent raised a preliminary objection that the appeal should be treated as having stood dismissed ever since the period specified in rule 22 of Order 35 expired, which was sustained by the Court.

In the judgment of Triantafyllides P., (as he then was) in *Harakis* (supra) we read the following at page 295:-

«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; ...»

And at pp. 296 and 297 the following observations appear as to the actions taken by the registry in informing counsel for the appellant as above:-

«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.

40 .....

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 should not taken any step in relation to an appeal which stands dismissed by operation of that rule, other than to certify that it does stand dismissed». 5

The only reason advanced by counsel for the applicants for non-compliance with the rules is the fact alleged in the affidavit of nis clerk that she failed, by oversight to bring to his notice that the appeal was filed, and that such oversight was detected after a writ of movables was issued against the applicants. 10

From the facts before us counsel was aware of the filing of the appeal but he only alleged that the letter of the Registry did not come to his knowledge. Once the advocate was aware of the filing of the appeal it was his duty under the rules to comply with the requirements of rule 21 without expecting any reminder from the Registrar. The fact whether the letter of the Registry came to his knowledge or not is entirely irrelevant in view of the mandatory provisions of rule 21 of Order 35. 15

In the circumstances before us we are of the opinion that the applicants failed to satisfy us that it is fit to exercise our discretion in their favour and grant their application. 20

As a result the present application fails and is hereby dismissed with costs in favour of the respondent.

*Application dismissed with costs against applicants.* 25