

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 48 (25 August 2023)
SCA MA 38/2023
(Arising in Civil Appeal SCA
20/2022)

Manyive Chang Sing Chung

(rep. by Mr. Serge Rouillon)

Applicant/Respondent

Vs.

1. Daniel Kim Koon

2. Leon Kim Koon

3. Kim Koon & Co. (Proprietary) Limited

(rep. by Mr. Kieran Shah and Mr. Basil Hoareau)

1st Respondent/1st Appellant

2nd Respondent/2nd Appellant

3rd Respondent/3rd Appellant

Neutral Citation: *Chang Sing Chung v Kim Koon and Others* [2023] SCCA 48 SCA MA 38/2023 (Arising in Civil Appeal SCA 20/2022) (25 August 2023)

Before: Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA

Summary: The Seychelles Court of Appeal Rules 2005 as amended — main heads of argument filed out of time in breach of the Rules.

The Appellant did not file an application to extend the time or to condone the delay.

Good cause not shown for the exercise of the Court's discretion.

Heard: 9 August 2023.

Delivered: 25 August 2023.

ORDER

The application to dismiss SCA 20 of 2022 succeeds and the Orders of the Supreme Court are upheld.

With cost in favour of the Applicant.

RULING

Dr. L. Tibatemwa-Ekirikubinza JA

(Dr. M. Twomey-Woods, F. Robinson JJA concurring)

THE BACKGROUND

1. This application was filed on 31st July 2023 seeking to have SCA 20 of 2022¹ struck out for failure by the Appellants to have their main heads of argument filed within the time prescribed by the Rules of this Court. The background to the application is enumerated below.
2. SCA 20 of 2022 was an appeal against the decision of the Supreme Court in MC no.4 of 2020, delivered on 19th September 2022.
3. On 26th October 2022, the Appellant filed a Notice of Appeal in this Court. On 22nd June 2023, both parties were served with the record. On the same day, 22nd June 2023 the Appellants filed a Notice of Motion for the Court to condone late filing of Skeletal Heads of Argument. Accompanying the Motion was an affidavit sworn by the 1st Appellant. A reading of the annexed affidavit however shows that the averments were in support of an application to amend the Notice of Appeal and not in support of leave to file heads of argument out of time.
4. On 4th of July 2023, Counsel for the Appellants moved the Court *viva voce* to amend the motion to reflect that it was intended as an application for amending the notice of appeal. That the affidavit would remain as it was. Counsel for the Appellant then immediately filed a “correct” Notice of Motion MA 28 of 2023 to amend the Notice of Appeal with the Registry. In effect, Counsel withdrew the application for filing heads of argument out of time.
5. On 14th July 2023, the parties were before Robinson JA to hear the Motion (SCA MA 28) for amending the grounds of appeal. Although the motion was an interlocutory application and could as per the rules of court be heard by a single Justice of the Court,

¹ Daniel Kim Koon, Leon Kim Koon and Kim Koon & Co (Pty) Ltd.

the Court directed that the Motion be heard on 7th August 2023. This would precede the date on which the appeal had been cause listed for hearing.

6. Court also directed that Counsel for the Appellant should go ahead and file the heads of argument regarding the grounds contained in the original Notice of Appeal filed with the Court. That in the event that the application succeeded, then the parties would go ahead and file arguments in regard to the added grounds. This direction was given although Counsel for the Appellant had expressed the opinion that it would be better to wait for the Court to determine the application, because in the event that their application succeeded, filing heads of argument prior to the determination of the application would subject them to filing heads of argument twice.
7. On 31st of July 2023, the Respondent in the appeal filed the present Notice of Motion (MA 38 of 2022) to strike out the Appeal for failure to file heads of argument as per the rules of the court.
8. On 3rd of August 2023, the Appellant filed the main Heads of Argument with the Registry. It is to be noted that the Appellant's heads of argument were filed 11 days past filing deadline. It is also to be noted that as mentioned above, the application to condone late filing had been withdrawn on 4th July 2023.
9. At the hearing of this application on 7th August 2023, Counsel for the Applicant pointed out that Counsel for the Respondents had not only filed the heads of argument out of time but furthermore, by the time of hearing, Counsel had not filed an application to condone the delay. Counsel for the Respondent conceded to this point - that indeed they had not filed any such application.

Reply to the application to strike out the appeal

10. In reply to the application to strike out the appeal, an affidavit sworn by the 1st Respondent was filed with the Court on the 9th August 2023. The Respondent conceded that the heads of argument were filed out of time. The Respondent avers that the reason for late filing was because the Respondents were waiting for Court to determine the

motion they filed on 4th of July 2023 to amend its Notice of Appeal. That filing heads of argument prior to the determination of the application would mean that in the event that their application succeeded, they would have to file heads of argument twice. That the late filing was not a deliberate contravention of the rules of the Court.

11. Counsel for the Respondent addressed the Court on what he understood as the meaning and effect of the law /rules on filing heads of argument. It was his argument that failure to file heads of argument is only fatal if the arguments have not been filed by the date of hearing. Counsel referred the Court to the provision in Rule 24 (2) (i) which states that:

Where at the date fixed for hearing of the appeal the appellant has not lodged heads of arguments in terms of this Rule, the appeal shall be deemed to be abandoned and shall accordingly be struck out unless the Court otherwise directs on good cause shown.

12. That consequently, since the heads of argument had been filed before the 11th of August, the date which the Court had fixed for the hearing of the appeal, the late filing was not fatal to the appeal. That the “mere” non-compliance with the set time period was not fatal. He argued further that the Court has the discretion - until the date of the hearing - to go ahead and hear an appeal even when the heads of argument have been filed late. That the motion to strike out the appeal should have been filed only if by the date fixed for hearing the appeal, heads of argument had not been filed. That it is only in those circumstances that an appeal is deemed abandoned. That the motion filed by the Applicant on 31st July was pre-mature.

13. Counsel argued further that in terms of good cause being shown for extension of time within which to file the arguments, this was found in the affidavit of the 1st Respondent. The Respondent had averred that the Respondents were waiting for the motion for amendment to be determined to avoid having to file further heads of argument in the event that the application were to succeed. That it was only after a decision was made that the motion for amendment would be taken up before the full bench (on 7th August

2023) that the Respondent saw it wise to file the arguments since there was a possibility that the appeal would proceed. That it was not the intention of Counsel to blatantly contravene the rules of the Court.

14. In rejoinder Counsel for the Applicant emphasized that although on the 14th July 2023, Robinson JA had directed Counsel to go ahead and file heads of argument regarding the grounds earlier filed, the Respondent had not filed the arguments until 3rd August – a few days before the date set for hearing the appeal.

Analysis by the Court

15. The specific law on filing heads of argument is provided by Rule 24 (a) of the Seychelles Court of Appeal as amended². It is as follows:

The appellant shall lodge with the Registrar five copies of the appellant’s main heads of argument within one month from the date of service of the record. Two copies of such main heads of argument shall be served on each respondent. (my emphasis)

16. It was the argument of Counsel for the Respondent that failure to file heads of argument by an appellant is only fatal if the arguments have not been filed by the date of hearing. I am however aware of a plethora of authorities which emphasize that breaches of time lines set by the Seychelles Court of Appeal Rules should as a general rule not be condoned. That there is a necessity for courts to adopt a tough stance on time limits. Indeed, the Court has in several cases dismissed appeals on the ground of breach of time lines by appellants.
17. In the very recent case of **Auguste v Singh Construction**,³ delivered on 16 December 2022 this Court pointed to several reasons why the rules of court must, prima facie, be obeyed. One such reason is that if the law were otherwise, a party in breach would have an unqualified right of extension of time. This would defeat the purpose of the rules

² S.I. 129 of 2022.

³ (SCA 52/2020) (16 December 2022)

which provide a timetable for the conduct of litigation. Secondly, parties are entitled to certainty and clarity in court proceedings and furthermore, the taxpayer is entitled to a system that is as cost-effective as possible.

18. In **Auguste** [supra], the facts were rather similar to what is before us in this application. The record was served on the appellant and the respondent on 6 October 2022. The appellant was notified on 9 September 2022 about the Practice Directions that require heads of argument to be filed timeously.
19. During the case management hearing on 8 November 2022, Counsel for the appellant undertook to file the skeleton heads of argument by 11 November 2022. This undertaking was not kept and, as a result, on 22 November 2022, the appellant was given another notice regarding the breach of the Practice Directions. The skeleton heads of argument were filed on 28 November 2022 — just two days before roll call — the respondent did not have enough time to file its skeleton heads of argument. The appellant did not file an application to extend the time or to condone the delay. In the result, the majority of the Court dismissed the appeal.
20. In another recent case of **Chetty v Esther**⁴ this Court, stated:

It is important to note that Rules of Court are made in order to be complied with. Without complying with and should the Court allow that to happen, then it is both sending wrong signals and establishing precedent, which may eventually lead to flouting and abuse of the whole court process. That should not be allowed to happen. This Court had an opportunity, recently, to re-emphasise this point (see *Central Stores Vs Minister William Herminie and Another*, judgment dated 25 February 2005; *Harry Berlouis and Francis Gill*, SCA No. 13 of 2003).

21. It follows that the argument of Counsel for the Respondent that non-compliance⁵ with the set time period was not fatal, cannot be a correct understanding of the law. Counsel

⁴ (SCCA 44 of 2020) [2021] SCCA 12 (13 May 2021)

⁵ What he refers to as “mere” non-compliance

seems to suggest that Court should first and foremost be guided by Rule 24 (2) (i) which is to the effect that an appeal shall be *deemed* to be abandoned if at the date fixed for hearing of the appeal the appellant has not lodged heads of arguments.

22. Rule 24 (a) cited above obliges an appellant to file heads of argument within a specified time period - one month - from the date of service of the record. The message underlying the rule can be understood and has meaning without reference to Rule 24 (2) (i) cited by the Respondent. There are certainly cases such as the one we are dealing with, where what has been flouted is 24(a) and not 24 (2) (i), and appeals have been dismissed. So flouting 24(a) has consequences.
23. I must now go back to the reasons given by the Respondents for not filing their heads of argument in time. Court must consider these reasons so as to determine whether to exercise its discretion and go on to hear the merits of the appeal even when the Appellants did not comply with the relevant rule. It is this which the court refers to as materials on which the Court can exercise its discretion.
24. Indeed, Rule 26 provides *inter alia* that “the times fixed within these Rules may, on good cause shown, be extended by the Court.” (my emphasis)
25. However, I am alive to the renowned principle that “**judicial discretion**” means the exercise of judgment by court based on what is fair under the circumstances and guided by the rules and principles of law.
26. The Appellants may have been under the impression that they should wait for the decision of the Court regarding their application for amendment of their grounds. But it has not been lost on the Court that the grounds which the Appellants sought to add to their notice of appeal cannot be said to have been intrinsically linked to the grounds in the original appeal. Indeed, this question was put to Counsel for the Appellant by Court on 14th July 2023. He had answered in the negative – the issues contained in the additional grounds had no link with the grounds earlier filed with the Court.

27. It therefore follows that the heads of argument that were needed to support the new grounds would not have led to a fundamental change in what would have been already filed. All that the Appellants would have done in the event of success with the motion would be to file arguments specific to the new grounds.
28. But even more important is that the Court's direction given on 14th July was that the Appellants (respondents in this application) should go ahead and file the arguments in regard to the grounds as already filed. And yet it took the Appellant/Respondents until 3rd August to comply with the Court's directive. And this was only after the Applicant had filed this Motion seeking the Court to strike out the appeal.
29. And when the Appellants eventually filed their heads of argument, aware that they were out of time, they did not file an application to have the time for filing extended by the Court or to condone the delay. And on the date when the application was heard no such application had been filed.
30. I am of the view that 'good cause' has not been shown for the exercise of this Court's discretion.
31. Mindful that rules of court are made to be complied with by parties and that judicial discretion must consider not only what is fair but must also be guided by the rules and principles of law, I am duty bound to dismiss the appeal as prayed by Counsel for the Applicant.

The Decision.

32. The Motion to strike out the appeal succeeds and consequently, SCA 20 of 2022 stands dismissed.
33. With costs in favour of the Applicant.



Dr. L. Tibatemwa-Ekirikubinza JA

I concur: -



Dr. M. Twomey-Woods JA

I concur: -



F. Robinson JA

Signed, dated and delivered at Ile du Port on 25 August 2023.