

IN THE SUPREME COURT OF SEYCHELLES

Reportable

[2021] SCSC ...
MA 200/2020
(CA 16/2020)

In the matter between

KANNUS SUPERMARKET
(rep. by Mr. E. Chetty)

PETITIONER

and

VAITHIYANATHAN UTHRAPATHY
(rep. by Ms. L. Pool)

RESPONDENT

Neutral Citation: Kannus Supermarket vs. Vaithiyanathan Uthrapathy (*MA200/20*) [2021] SCSC

Summary: Leave – Appeal out of time – factors to be taken into consideration -

Before: G. Dodin

Heard: 12 April 2021

Delivered: 14 June 2021

RULING

Dodin J

[1] The Appellant representing Kannus Supermarket being dissatisfied with the decision of the Employment Tribunal given on the 24th September 2020 and amended on the 15th October 2020, seeks leave of this Court to appeal against the decision out of time.

[2] In an affidavit in support one Shanmovgasvndaram Pillay who claims that he is duly authorized to swear this Affidavit on behalf of the Appellant states that he has been advised and believes that the learned Chairperson erred in both law and on facts in her judgement.

He is seeking leave to Appeal out of time as the amount of time that has lapsed is not inordinate and will not cause any prejudice to the Respondent.

- [3] He states that the reason for the delay is due to an omission and mistake on the part of the Appellant in view of the fact that the Appellant's attorney was on sick leave when the Judgement was delivered and the Appellant's representative could not meet with him to discuss about filing the appeal. He further states that the matter was not cause-listed for the 24th September 2020.
- [4] He further states that the final part of the said judgment was amended by the Employment Tribunal on the 15th October 2020 after Counsel for the Respondent requested for the amendment without notifying and inquiring if the Appellant wished to take a position on the matter.
- [5] He states that in the event leave is not granted serious prejudice will be caused to the Appellant and that it is in the interest of justice that this Court hears the appeal.
- [6] In reply to the motion the Respondent states that the judgment was given before the Employment Tribunal on 24th September 2020, however the Appellant was not present before the Tribunal and no explanation was given for the absence. The Applicant was notified by email. Subsequently clarification was sought by the Respondent with regard to the calculations of benefits awarded. A ruling was given on 15th October 2020 to rectify the calculations. There was no need to notify the Appellant.
- [7] The Respondent denies that any prejudice would be caused to the Appellant and that on the contrary serious prejudice will be caused to the Respondent who had to wait for 1 ½ years and is still waiting for the case to be completed. Further the Respondent is not allowed to work and he has to depend on the generosity of friends for food and accommodation.
- [8] Learned counsel for the Appellant submitted that the decision was given on 24th September 2020 and the Appellant had 14 days to appeal but appealed on 16th October 2020 which is 8 days out of time. 8 days is not inordinately long time and a time frame

that is not exorbitant. No prejudice would be caused to the Respondent despite the mistake on the part of the Appellant. Learned counsel submitted further that on 15th October 2020 the Employment Tribunal made alterations to decision despite being *functus officio* hence the period for appeal should start from 15th October 2020. He moved the Court to grant the Appellant leave to proceed with the appeal out of time or to find that the period of appeal started to run from the 15th October 2020.

[9] Learned counsel for the Respondent submitted that judgment was given on 24th September 2020. The Appeal was filed on 16th October 2020 which is 8 days late. The ruling entered on the 15th October was for calculation of benefits only to correct an error. The Tribunal can rectify such error since it can regulate its own proceedings. Learned counsel submitted that there is no change in the judgment of 24th September and since 14 days had elapsed this Court should not give more time. Learned counsel moved the Court to refuse leave and to dismiss this motion with cost.

[10] Whether an Appellant should be granted leave to proceed with an appeal out of time is a matter of discretion that rests with the Court. However the Court must exercise such discretion with certain caution and must take into consideration certain factors which would assist in determining whether granting such leave is justified and fair to the parties.

[11] In the case of *Parcou v Parcou SCA 32/1994, LC 93* it was held that the Court has the discretion to allow appeals out of time. The factors to be taken into account when exercising the discretion are length of delay, reasons for delay, degree of prejudice to the defendant, and whether there is an arguable case on appeal. The Court further noted that the limitation rules should not be suspended because of an understanding between counsel, however the appellants should not be penalised for relying on the pardonable error of counsel.

[12] In *Farm AG v Barclays Bank SSC 2002* again the Court expressed that the Court has an unfettered discretion in matters of delay and extending time for appeals. The Court will

exercise its discretion for the purpose of doing justice to the aggrieved given the particular facts of the case. The legitimate expectations of a respondent that no appeal would be lodged after the expiry of a notice-period cannot in the interests of justice defeat an applicant's right to apply for leave out of time.

[13] In the case of *Germain v Republic Crim 1(a) 2005, 5 March 2007* the court also held that non-compliance with a procedural requirement is not fatal to an appeal, provided that the appellant shows "good cause" to justify the non-compliance. In deciding whether to grant leave to appeal, the court should take into account all the circumstances of the case, including the intention of the applicant, diligence of counsel, proper explanation for delay, extent of delay, undue prejudice, and the merits of the application for leave to appeal.

[14] Recently in the case of *Denton and Others v TH White limited [2014] 1 WLR 3926* the Court of Appeal [England] identified a 3-stage approach to applications for determining whether to grant leave to appeal out of time. The first stage is to identify and assess the seriousness or significance of the failure to comply with the Rule. If a Judge concludes that a breach is not serious or significant, then leave will usually be granted and it will be unnecessary usually then to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance. The second stage is not derived from the express wording of the rules but it is nonetheless important particularly where the breach is serious or significant. The Court should consider why the failure or default occurred. The third stage requires that in every case, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application.

[15] Having considered the Affidavit of Shanmovgasvndaram Pillay and heard submissions of learned counsel, I am persuaded to believe that there was a genuine misapprehension on the part of the Appellant particularly noting that his counsel was indisposed and unavailable at the time. I also find that the Tribunal did not finalised the matter until the 16th October, 2020 when it had to rectify part of the judgment. Considering also that the

delay is not inordinate, no prejudice would be caused to the Respondent should the appeal be heard on the merits.

[16] Consequently I accede to the Application and grant the Appellant leave to file the Appeal out of time. Such time should not be more than ten working days from today.

[17] Costs shall follow the Appeal.

Signed, dated and delivered at Ile du Port, Mahe, on 14 June 2021.

G Dodin

Judge