

SUPREME COURT OF SEYCHELLES

Reportable
MC 67/2023

In the matter between:

DANIEL MONTHY

Applicant

Of

Anse Boileau, Mahe Seychelles
(represented by Ms. Shantana Barbe)

And

THE ATTORNEY GENERAL the (representing
the Government of the Republic of
Seychelles)
(represented by Mr. Alvin Marie)

Respondent

Neutral Citation: *Daniel Monthy v The Attorney General* (MC67/2023) (25 March 2024)

Before: Adeline j
Summary: Application for leave to appeal out of time
Heard: By Submissions
Delivered: 25th March 2024

FINAL ORDER

The preliminary objection is overruled and is accordingly dismissed.

RULING ON MOTION

Adeline J

[1] This is a ruling on motion on notice, brought by one Daniel Monthy, (“the Applicant”), of Anse Boileau, Mahe, Seychelles pursuant to rule 1 read with rule 5 of the Appeal Rules (SI 11 of 1961) made under the Courts Act, Cap 52 of the laws of Seychelles, (“the Act”), by which the Applicant applies to this court for an extension of the time prescribed to file an appeal against the ruling of her worship, learned Magistrate Larah Michaud, delivered on the 17th April 2023 in CS93/2022.

[2] The motion is duly supported by an affidavit of 23 paragraphs deposed by the Applicant, to which are exhibited some documents, and on whose behalf learned counsel tendered for consideration written submissions. Learned Counsel urges the Court to grant the application and allow the appeal out of time.

[3] In opposition to the application, learned Counsel for the Respondent raises preliminary objections to the application.

[4] In its affidavit in support of the application for an extension of time, the Applicant/deponent, deposes as follows:

1. *That I am the Deponent herein and the Applicant in the application for leave to appeal out of time.*
2. *That I was Plaintiff in case CS 93/2022 before Magistrate's Court C wherein a ruling was delivered by Honourable Magistrate L. Michaud on 17th April 2023, which erroneously dismissed my case on a plea in limine litis, namely on the ground that my case had no cause of action. (A copy of the Plaints in CS 93/2022 and the ruling are exhibited and attached herewith collectively marked as **DOC 1**)*
3. *That I work as a fisherman and I normally spend most of my time out at sea for a considerable amount of time, sometimes for a total of 20 days per month.*
4. *That initially my case was set for ruling on dates earlier than 17th April 2023 but when the case was called, the Honourable Court informed that the ruling was not ready and the delivery of the ruling was therefore postponed to later date.*
5. *That, due to the postponements, and given that I am the main breadwinner for my family, I could not miss work to remain on Mahe in order to be in attendance when the ruling was delivered.*
6. *That, on the day that the ruling was finally delivered, I was out at sea working and I was not on Mahe.*
7. *That I was represented at the ruling by my lawyer, Ms Shantana Barbe.*

8. *That I have been informed by my lawyer that she tried to contact me on the day that the judgement was delivered to inform me of the outcome of the case, but to no avail due to connectivity issues.*
9. *That I travelled back to Mahe on the night of 18th April 2023 but I had to leave to go back to sea less than 24 hours after returning to Mahe.*
10. *That, thereafter, I did come back to Mahe, though I had to leave for India on 3rd May 2023 for medical treatment. (Copies of the relevant medical documents are exhibited herewith and marked as **DOC 2**)*
11. *That whilst I was in India I could not contact my Lawyer and could not receive communication from her.*
12. *That I came back to Seychelles on Sunday 14th May 2023.*
13. *That I contacted my lawyer on Monday 15th May 2023 and I met with my lawyer in that same week, on Thursday on 18th May 2023.*
14. *That, due to being out at sea for work purpose and attending medical treatment abroad, I was unable to meet my lawyer earlier so as to properly seek advice on whether I would be able to file an appeal and, whether I had good grounds to do so.*
15. *That by the time I sought proper legal advice from my lawyer and discussed the ruling, the 14 days' time limit for lodging an appeal had lapsed.*
16. *That after being advised by my lawyer I verily believe that I have an arguable case for appeal and a high chance of succeeding on the appeal, especially due to the fact that my case was erroneously struck out on point of law raised by the Respondent herein, the Defendant in CS 93/2022, before the Honourable Court could hear the merits of the case. Exhibited herewith and marked as **DOC 3** is the Notice and memorandum of appeal (grounds of appeal) that I intend to file, should leave be granted to do so out of time.*

17. *That on the 19th May 2023, I signed an affidavit dated the same date in order to seek leave from the court and to file my appeal out of time. (Exhibited herewith is a copy of the application to appeal out of time, supporting affidavit, notice of appeal and grounds of appeal all dated 19th May 2023 and collectively marked as **DOC 4**).*
 18. *That thereafter I left Mahe for work purposes and that due to work commitments I was not always available to finalize the supporting documents that were needed to file the application in a timely manner. I left my relatives in charge to finalize the outstanding matters but unfortunately this was not done as needed.*
 19. *That as a result of my absence due to work purpose and the omission of my relatives to attend to what was needed to be done for the prompt filing of my case, I am now signing a second affidavit explaining the delay encountered thus far.*
 20. *That if I am denied the opportunity to file the notice of appeal out of time, my appeal will not be heard, the merits of the main case will not be heard, and I will suffer great injustice.*
 21. *That I strongly believe that it is in the interest of justice that leave be granted to me to appeal out of time and that no detriment will be caused to the Republic if the leave is granted.*
 22. *That if I am granted leave to file the appeal out of time and I lose the appeal, I am ready and willing to pay costs to the other party if I am ordered to do so.*
 23. *That the statement made in paragraph 22-24 are true to the best of my knowledge, information and belief.*
- [5] It is observed, that instead of tendering an affidavit in reply, the Respondent, through learned Counsel, opted to raise “objections” to the application which in fact are “preliminary objection” because it is an attempt by the Respondent to require the court to deal with certain issues separately as these issues are preliminary in nature and their resolution will make examination of the merits of the application unnecessary.

- [6] My reading of the Respondent's objection to the application to appeal out of time, leads me to the conclusion, that the matters addressed at paragraph 1-5 and 6-11 of his written objections focus on the merits of the application, and therefore, cannot be matters for consideration as "preliminary objections".
- [7] It is worth mentioning, that in our jurisdiction, the expression "preliminary objection" is used to refer to objections pertaining to matters, such as, the jurisdiction of the court, a plea of prescription or limitation, Res-judicata, Res-subjudice and the like. It usually contains a point of law which, if the party raising the objection as a preliminary point succeeds, then the suit, petition or application, for example, is disposed of. Having said that, it follows, that a preliminary objection cannot be raised if any fact has to be ascertained. That is to say, it cannot be based on unascertained factual matters.
- [8] In Sugar board of Tanzania v 21st Century Food and Packaging and two others, Civil Application No 20 of 2007 (unreported) the Court of Appeal of Tanzania elucidated the essence of a preliminary objection when it stated the following:
- "A preliminary objection is in the nature of legal objection, not based on the merits or facts of the case, but on the stated legal procedural or technical grounds. Such an objection must be argued without reference to evidence. The fundamental requirements is that any alleged irregular defect or default must be apparent on the face of the notice of motion so that the objector does not condescend to affidavit or other documents accompanying the motion to support the objection".*
- [9] In essence, therefore, any point of objection which disposal requires adduction of evidence fails the test for a valid legal preliminary objection. It is for this particular reason, that I find that paragraphs 1-5 and 6-11 of the Respondent's written objections cannot be made the subject of consideration for the preliminary objections.
- [10] Nonetheless, paragraph 12 and 13 under the heading "Power of the court to condone the delay" is worthy of consideration in the light of the objections raised by learned Counsel

for the Respondent that can indeed be argued as “preliminary objections” Paragraph 12 reads:

“12 As stated above, Section 6(2) of Appeal Rules 1961 provides that a prospective Appellant must file his notice of appeal within fourteen days of the Magistrate’s ruling. However, there is no provision under the Appeal Rules or another law which enables the Applicant to file a notice of appeal after the fourteen days has already elapsed, nor are there any provisions enabling the Supreme Court to extend the time limit for filing the notice of appeal”

[11] Paragraph 13 reads:

“The Respondent avers, that in the current case there is no provision under the law which grants the Supreme Court the power to listen to the Applicant’s appeal from the Magistrate Court out of time. Unless the power to condone the Applicant’s delay in filing the appeal is specifically provided for under the law, the court may not exercise power to grant leave for the Applicant to file its notice of appeal out of time”

[12] Clearly, therefore, the issues raised by paragraphs 12 and 13 of the Respondent’s submissions are issues of jurisdiction fit to be raised as preliminary objections. Essentially, it is contended by learned Counsel for the Respondent that (i) once the 14 days for filing a notice of appeal has lapsed, there is no law that allows the Applicant to file a notice of appeal, and (ii) nor is there any law that empowers the Supreme court to extend the time limit by granting leave to the Applicant to file its notice of appeal out of time.

[13] In her written submissions addressing the proposition made by learned Counsel for the Respondent that the Supreme court has no power to grant leave to the Applicant to file notice of appeal out of time, learned Counsel disagrees. Learned Counsel submits that the Supreme court does have such discretionary power, and that this has been confirmed by Dodin. J in the case of Parcou Vs Parcou SCA 32/1994 when he stated, that “the Supreme court does have a discretion to allow appeals out of time”.

[14] Submitting on the general application of the principle in other Jurisdiction, learned Counsel cites the Tanzanian case of Tumain Jamal v The Tanzanian Postal Bank, (1/2019) in which case the court was guided by the English case of Ratman V Kumarasamy and another [1964], and stated the following:

“The discretion ... to extend the time fixed for doing an act is one to be exercised judiciously. What constitute good cause cannot be laid down by any hard and fast rules. This depends on the prevailing circumstances of each particular case. It is upon the party to provide the relevant material in order for the court to exercise its discretion”.

[15] Reading the submissions of learned Counsel for the Applicant on whether or not this court does have jurisdiction to grant the relief being sought for, I find, that learned Counsel put more emphasis on how the court should exercise such a discretion and the matters to be taken into consideration rather than where the courts actually get the discretionary power to extend the time limit to file notice of appeal out of time.

DISCUSSION OF THE LAW

[16] Propositions about the law result from thought about the law, which of course, is the business of jurisprudence. In law, we are very much concerned with those propositions in which jurisprudence formulates its most general conclusions. Within this background, the propositions made by learned Counsel for the Respondent that there is no provision under the Appeal Rules or another law which allows the Applicant to file notice of appeal out of time when the 14 days’ limitation period has lapsed, and that there is no provision empowering the Supreme Court to extend the time limit for filing the notice of appeal, are propositions that are partly correct and partly incorrect.

[17] It is correct, that in the instant case, the Applicant is not permitted by law to file a notice of appeal as of right to trigger an appeal to the Supreme Court against the ruling of her worship Michaud delivered in the Magistrate court on the 21st March 2023. This is because the 14 days from the date of the ruling has lapsed. It is an incorrect proposition to suggest, that there is no provision which empowers the Supreme court to extend the time

limit for filing a notice of appeal to appeal against the ruling to the Magistrate court. For that particular reason, I am perplexed by the superficial way that learned Counsel for the Applicant has addressed these issues given that the court's power in that regard is provided for under the Appeal Rules made by way of subsidiary legislation under the Courts Act, and for that matter she could have been more elaborative.

[18] The relevant provisions of the Appeal Rules as regards to appeals from the Magistrates' court worthy of citing are found under rule 6(1) and rule 6(2). Rule 6(1) reads:

6(1) reads:

“Every appeal shall be commended by a notice of appeal”.

6. (2) reads:

“The notice of appeal shall be delivered to the clerk of the court within 14 days from the date of the decision appealed against unless some other period is expressly provided by the law which authorises the Appeal”.

[19] The use of words *“shall be delivered”* means, that it is mandatory that the notice of appeal be delivered within fourteen days from the date of the decision. This also means, that it is the right of a prospective Appellant to file notice of appeal, as of right, within the fourteen days' period. In the instant case, it is clear on the face of the Applicant's pleadings, that this did not happen and that the Applicant is now time barred and cannot file his notice of appeal under rule 6 (2) of the Appeal Rules as of right. The issue that is now calls for consideration is, whether, in the circumstances, the door is shut and cannot be reopened for the Applicant to file his notice of appeal out of time.

[20] To address this issue, I need to examine the provisions of rule 5 of the Appeal Rules which is couched in the following terms:

“5. Any party desiring an extension of time prescribed for taking any step may apply to the Supreme court by motion, and such extension as is reasonable in the circumstances may be granted on any ground which the Supreme court considers sufficient”.

[21] My reading of rule 5 of the Appeal Rules, provides me with reason to believe, that the door can be reopened for the Applicant to file its notice of appeal out of time. This is because rule 5 provides a prospective Appellant with this option at the discretion of the court. Moreover, my reading of rule 5, leads me to the conclusion, that once the prescribed 14 days has lapsed, the Applicant cannot file notice of appeal as of right. He may apply to the Supreme court for an extension of time to file notice of appeal. It is also my conclusion, that whether to grant or not to grant an extension of time to file appeal out of time is at the discretion of the court. It is, in other words, a discretionary power conferred upon the Supreme court by the Appeal Rules, to grant or not to grant an extension of time to file notice of appeal. The use of the words “May be granted” in rule 5 indicates that the court has a discretion whether or not to grant an extension of time.

[22] Therefore, the Supreme court is vested with a discretionary power to exercise its discretion when entertaining an application as the present one before this court for leave to file notice of appeal out of time. I will not, at this juncture, venture to discuss the law as to how the Supreme court should exercise such as discretion based on our jurisprudence in this area of law in order to avoid the temptation of encroaching on the merits of the application. I will leave that to another day when the necessity would arise.

[23] In the final analysis, therefore, the objection raised by learned Counsel for the Respondent to the Applicant’s application to appeal out of time is overruled, and is accordingly dismissed.

Signed, dated and delivered at Ile du Port on the 25th March 2024.

Adeline J