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ANDREW DAUMAOMA -v- DAVIDSON TUA & 3 OTHERS

High Court of Solomon Islands

(Palmer J.)

Civil Case No. 327 of 1992

Hearing: 10 December 1992

Judgment: 11 December 1992

T. Kama for Applicant

R. H. Teutao for the Respondents

PALMER J: This is an application by way of a notice of motion for leave to enlarge time to appeal against an interlocutory order of the Malaita Magistrate's Court made on the 24/9/92 awarding Solicitor own client costs to the Respondents.

The application is made pursuant to Order 60 Rule 3(1) which says:

".....no appeal shall be brought after the expiration of 14 days in the case of an appeal against an interlocutory decision or of three months in the case of an appeal against a final decision unless the Magistrate's Court or the Court shall enlarge the time."

The last part is important to note. It recognises that the Magistrate's court or this Court has the power to enlarge time. The word "unless" is also defined as "if not" or "except when".

So it is not an abuse of process to make the application to enlarge time to appeal.

The grounds on which such enlargement of time can be made however is important. There must at least be an affidavit setting forth "good and substantial reasons for the application and the grants of appeal should prima facie show good cause" for the leave to be granted.

In order to assess whether there is good and substantial reasons and good cause being shown on a prima facie basis, one needs to look at the affidavit evidence and the submissions presented.

The grounds submitted in essence are that there was delay in obtaining the court's record of the proceedings to enable the Solicitor of the Applicant to lodge an appeal. And the good cause shown as to why leave should be granted is that there is an error of law as to the calculation of the costs which should have been on a party to party basis and not solicitor and client costs as provided for under Order 31 of the Magistrates' Courts Rules.

The evidence provided in support of the delay question is contained in the affidavit of Thomas Kama Esquire and also in the evidence of Mr. Paul Daokalia under Oath.

In paragraph 3 of his affidavit he stated that the first time he became aware of this particular action was on the 24 September 1992 through a telephone call from Mr. Paul Daokalia. Mr. Daokalia in his evidence under Oath stated that though Mr. Kama was recognised as their legal representative, he was not instructed on this case because he thought he could handle the case in his capacity as a spokesman for his uncle, but realised at the hearing that he was being objected to and ruled against by the court, and so had to inform Mr. Kama then about the case.

In his evidence Mr. Daokalia stated that he was able to see Mr. Kama personally on the following week after the hearing and on explaining to Mr. Kama the situation regarding costs and being advised of the error he decided to appeal against the ruling of the court.

He stated that the appeal was not lodged until he had been able to obtain a copy of the Magistrate Court's ruling on the 23 October 1992, but this was only after a relative went and got the file and had the contents faxed over.

The objection raised by Mr. Teutao in essence is that the delay was inexcusable as Mr. Daokalia was fully aware of the court's ruling, he being present in court that day and therefore should have been fit and proper to instruct Mr. Kama about the appeal.

Mr. Daokalia's explanation was that he in his layman's view felt it was proper that he should get a copy of the court's decision before instructing his Solicitor further as it had been requested by Mr. Kama anyway.

In weighing the merits of this application, the over-riding concern of the courts must always be to ensure that justice is done.

Where there are time limits, it is trite law that in the interests of justice enlargement of time can be granted even after the period of time allowed for the appeal had elapsed.

On the question of delay, I am not satisfied that it was deliberate and intentional and that therefore injustice and inconvenience has been caused.

The explanations given in my view were honestly made without any intention to cause injustice to the Respondents, nor a deliberate attempt at thwarting payment. In fact the total sum had been deposited with Mr. Kama.

The request for a copy of the court record is justifiable, on the grounds that Mr. Kama was not present at the hearing and in order to file a proper appeal he needed to be fully informed of exactly what transpired.

Further, part of the delay was due to lack of typing facilities at the Magistrate Courts Office.

However, I need to point out here that delay is not the only ground for the basis of my ruling.

The way in which the order by consent was obtained in my view raises an important issue in law and warrants the courts discretionary power to be exercised to ensure that that issue is properly dealt with by way of enlarging time for leave to appeal.

The consent order for costs was made with Mr. Daokalia in the absence of legal advice. At that time, there was no way he would have recourse to legal advice about the issue of costs. Further there is merit in the submission that a wrong scale had been used. This court has a duty to ensure that errors of law couched in a consent order and obtained in a way which savours of unfairness and injustice through unequal bargaining powers must be given opportunity to properly challenge in a court of law to ensure justice is not only done but seen to be done.

There was no way that Mr. Daokalia would have been aware of the differences between party to party costs and Solicitor/Client costs. His consent cannot reasonably and fairly be regarded as done with full knowledge and understanding of the scale of costs that should be applied and that at the time he consented he agreed to waive his legal rights as to the correct assessment. If he had a Solicitor, that would have been different.

I am satisfied there is good cause being shown and that to ensure that justice is being done to the parties, enlargement of time to appeal must be given.

It would be unjust and unfair to the Applicant if through an obvious error on the face of the record cauched in a consent court order be allowed to subsist due to time constraints under the High Court Civil procedure Rules and that the court is powerless to intervene in the interests of justice.

Estoppel will not succeed where the deed or agreement is tainted with illegality (Odger's Principles of Pleading and Practice in Civil actions in the High Court of Justice page 189). The grounds for the claim allege errors and irregularities in the consent order which questions in turn the legality of the consent order, and so unless that point is fully argued and a finding made, it would not be appropriate at this stage to make any final rulings on the ground of estoppel raised.

Finally, there would not be any injustice caused to the Respondent by allowing leave to appeal out of time. This is merely an interlocutory order and the question of costs has been awarded in favour of the Respondent.

The issue really is the quantum based on the correct scale of costs as set out by the appropriate Act.

The Respondent stands to gain no matter what the outcome is and it is this courts responsibility to ensure that even in the question of costs justice is being duly done.

Application for leave to enlarge time to appeal is granted.

Time enlarged for 7 days and no more. Costs of today to be borne by the Applicant.

(A. R. Palmer)
JUDGE