

IN THE SUPREME COURT OF BELIZE, A.D. 2008

ACTION NO. 87 OF 2004

(KENNETH MUNNINGS

CLAIMANTS

(Executor of the Estate of KC Dunn

(DARLENE DUNN

(

BETWEEN (AND

(

(JOSEPH YANCEY

DEFENDANTS

Before MADAM JUSTICE MICHELLE ARANA

Mrs. Melissa Balderamos Mahler of Musa and Balderamos for the
Claimants

Mrs. Ashanti Arthurs Martin of Glenn Godfrey and Company for the
Defendants

DECISION

1. This is an application for leave to appeal against an interlocutory decision made by Awich J. in which His Lordship dismissed an application by the Defendants to strike out the Claimant's Statement of Claim.

2. The Defendants brought this application pursuant to section 14(1) (h) and section 14 (3) (b) of the Court of Appeal Act Chapter 90 of the Laws of Belize Revised Edition 2000. Section 14 (1) reads as follows:

14 (1) An Appeal shall lie to the Court in any cause or matter from any order of the Supreme Court or a judge thereof where such order is:-

(a) final and is not an order as is referred to in paragraph (f) or (g);

(b) an order made upon the finding or verdict of a jury;

(c) an order upon the application for a new trial;

(d) a decree nisi in a matrimonial cause or an order in an Admiralty action determining liability;

(e) an order declared by rules of court to be of the nature of a final order;

(f) an order upon appeal from any other court, tribunal, body or person;

(g)

(i) a final order of a judge of the Supreme Court made in Chambers;

(ii) an order made with the consent of the parties;

(iii) an order as to costs;

(h) an order not referred to else where in this subsection.

Section 14 (3) of the Court of Appeal Act reads as follows:

14(3) No appeal shall lie from any order referred to in paragraph (g) or (h) of subsection (1):-

(a)except

- (i) where the liberty of the subject or the custody of infants is concerned;**
- (ii) where an injunction or the appointment of a receiver is granted or refused;**
- (iii)in the case of a decision determining the claim of any creditor or the liability of any director or other officer under the Companies act in respect of misfeasance or otherwise;**
- (iv) in the case of an order on a special case stated under the Arbitration Act;**
- (v) in the case of an order refusing unconditional leave to defend an action;**

(b) in any other case, except with the leave of the Supreme Court, or if it refuses, of the Court.

3. The substantive claim is an action brought by the Claimants against

the Defendant for the sum of \$300,000 US as the value of their 10%

(iii)in the case of a decision determining the claim of any creditor or the liability of any director or other officer under the Companies act in respect of misfeasance or otherwise;

(iv) in the case of an order on a special case stated under the Arbitration Act;

(v) in the case of an order refusing unconditional leave to defend an action;

(b) in any other case, except with the leave of the Supreme Court, or if it refuses, of the Court.

4. Counsel for the Claimant submits that the Court should take certain considerations into account when deciding whether to grant leave to appeal. These include the likelihood of the appeal succeeding, and the degree of prejudice to the Respondent if the application for leave is granted. In advancing her argument that there is a strong likelihood that the appeal will succeed, Ms. Arthurs referred to three substantive grounds on which the appeal is based, firstly, that it is the Defendant's position that the sale of the land by Sittee River Company Ltd to a third party was a condition precedent to the performance of the share purchase agreement between the Claimants and the Defendant. Secondly, that it was Sittee River Company Ltd., and not the Defendant acting in his personal capacity who sold the land and therefore the Claimant has brought the action against the wrong defendant. Thirdly, that the sale of land agreement which is the subject of this action was terminated in 1996 and was never completed by the parties and since the agreement for the sale of shares depended on the sale of land agreement, both agreements were terminated. The Defendant argues that since this action commenced 8 years after the agreement, it is now statute barred by virtue of section 4 of the Statute of Limitations Act Chapter 170 of the Laws of Belize 2000.

5. In addressing the issue of whether prejudice would be caused to the Claimant if the Court were to grant this application, counsel for the Defendant states that the Claimant would not be prejudiced because they could always bring another action against the Sittee River Company Ltd instead of against the Defendant personally.
6. In her response to these submissions, Counsel for the Claimants argued strenuously that the application should not be granted because the Supreme Court no longer has jurisdiction over the matter as it was brought out of time. Mrs. Mahler argues that this application can only be heard by the Court of Appeal and to buttress this argument, she referred this court to section 16(1) of the Court of Appeal Act Chapter 90 of the Laws of Belize 2000 which states that:

16(1) Where a person desires to appeal under this Part to the Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within 21 days from the date on which the order of the Supreme Court or a judge thereof was signed, entered or otherwise perfected.

7. Counsel for the Claimants states that the decision of Awich J was delivered in the presence of both counsel and signed by him on October 11th 2005 and since this application for leave by the Defendant was dated November 30th, 2005, this application should not be granted as it is out of time. She further argues that the Defendant

has not sought nor has he been granted an extension of time within which to make this application.

8. Counsel for the Claimants also took issue with the affidavit of the Defendant in which he sought to urge upon this court the grounds on which this application should be granted. She submits that the Defendant's affidavit speaks to certain legal arguments advanced by his attorney at the hearing before Awich J when His Lordship dismissed the application to strike out the Statement of Claim. Since the Defendant was not present at the hearing he cannot depose to what occurred, therefore those paragraphs in his affidavit should be struck out in accordance with the general rule that an affidavit must contain information that the deponent can prove from his own knowledge and may only contain information based on his belief where the rules allow him to do so. She submits, correctly in my view, that these arguments deposed to by the Defendant are irrelevant and should be struck out.

9. It was also argued on behalf of the Claimants that the Defendant's affidavit contains no grounds to support this application for leave to appeal, since it merely reiterates the earlier arguments made before Awich J. In urging this court to reject this application, she cites paragraph 1504 of Halsbury 3rd edition Volume 37 as support for her

contention that leave to appeal should only be granted where the Court considers that the appeal would have a real prospect of success or for other compelling reasons.

10. Mrs. Mahler for the Claimants also drew the Court's attention to paragraph 856 of Halsbury's 3rd edition Volume 30 which states that the Court of Appeal does not interfere in matters coming within the discretion of the judge in chambers unless that discretion has been exercised on a wrong principle, or not at all, or there has been some miscarriage of justice. She submits that the judge at the previous hearing properly considered all the evidence before him and ruled accordingly, and that there is no evidence that the judge exercised his discretion wrongly or on a wrong principle or that there has been a miscarriage of justice. Counsel also argues that the ruling by Awich J did not in any way prejudice the Defendant since His Lordship merely refused their application and proceeded to give directions as to how the trial should proceed.

11. I agree with all the submissions made on behalf of Counsel for the Claimants. I find that this application is out of time as it should have been filed within the 21 days since Awich J delivered the ruling. Having read the judgment of Awich J and having considered all the arguments and the evidence before me, I am not convinced that if

leave is granted this appeal would have any chance of success. I therefore refuse this application for leave to appeal.

12. I will reinstate the directions for the trial to proceed as set out by Awich J in his ruling so that all parties can have their issues properly ventilated and this matter can finally be resolved. I therefore order that the Claimants are directed to file a Reply, if any, to the Defence filed by the Defendant within 14 days of today's date. This Reply is to be accompanied by a statement of truth as required by Rule 19.9(2) of the Supreme Court Civil Procedure Rules. This case is to be listed for case management by September 26th, 2008.


MICHELLE ARANA
SUPREME COURT JUDGE

Dated this 9th day of June, 2008.