

IN THE COURT OF APPEAL OF BELIZE AD 2024
CIVIL APPEAL NO 15 OF 2022

BETWEEN:

ENGLEBERT TIABO

Appellant

and

EDMOND TIABO (as the Executor of the Estate of KATHLEEN TIABO)

Respondent

Before:

The Honourable Mr. Peter Foster
The Honourable Mr. Arif Bulkan
The Honourable Mde. Michelle Arana

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mrs. Nazira Myles for the Appellant/Applicant
Mr. Arthur Saldivar for the Respondent

2023: 24 October

2024: 27 June

Reasons for Decision

[1] **Foster JA:** On 24th October 2023, the Court heard an application brought by Mr. Englebert Tiabo (“Applicant”) for an extension of time to serve the Notice of Appeal and/or for substituted service. We granted the application (by consent) and ordered that, service of the notice of appeal be deemed to have been made on 4th January 2023. We also ordered that the time for all other proceedings in the appeal shall run from 25th October 2023, and that each party shall bear their own costs. The Court also had to determine an application by Mr. Edmond Tiabo (as the Executor of the Estate of Kathleen Tiabo) (“Respondent”) to strike out the appeal for failure to serve the Notice of Appeal within the time prescribed by Order II Rule 4(2) of the **Court of Appeal Rules**, Schedule II of the **Senior Courts Act**. The Court dismissed the strike out application. We further promised to provide written reasons for our decision at a later time. We do so now.

Background

[2] The matter arose in this way:

- a) The Applicant sought to appeal the decision of the learned judge dated 5th December 2022, by filing a Notice of Appeal on 20th December 2022. Pursuant to rule 4(2) of Order II of the **Court of Appeal Rules**, the Applicant had seven (7) days to serve the Notice of Appeal on the Respondent. However, owing to the circumstances described below, the Applicant was unable to effect personal service on the Respondent of the Notice of Appeal within the requisite 7-day period.
- b) According to the amended affidavit of the Applicant dated 23rd February 2023, he, through a process server, made several futile efforts to locate the Respondent between 20th and 23rd December 2022. In the last attempt on 23rd December 2022, the process server left the Notice of Appeal at the residence of the Respondent's brother, Mr. Glenford Tiabo, in Belize City.
- c) The Applicant also sought to serve the Notice of Appeal on the Respondent at a Belmopan address by requesting the assistance of the Police Department. Officers visited the Belmopan property on 21st December and on 23rd December 2022, but could not locate the Respondent. A copy of the Notice of Appeal was left with the Respondent's brother, Mr. Glenford Tiabo, in Belmopan.
- d) In addition to taking those steps, the process server also left a copy of the Notice of Appeal at the law office of the Respondent's counsel at trial, Mr. Richard Bradley, on 22nd December 2022.
- e) On 4th January 2023, the Respondent was personally served with the Notice of Appeal.

Proceedings in the High Court

[3] The Applicant, having not personally served the Respondent with the Notice of Appeal within the stipulated seven days, applied to the High Court on 27th December 2023, for an extension of time to serve the Notice of Appeal, or alternatively for an order for substituted service and for a stay of execution of the judgment pending the appeal. The judge considered the applications together. In relation to the application for extension of time, the judge dismissed the application on the basis that:

“27. The High Court does not have the jurisdiction to grant an extension of time to serve a Notice of Appeal, or to make an order for substituted service. The Court of Appeal has the exclusive jurisdiction to deal with any issue in relation to the service of a Notice of Appeal.

28. The Senior Courts Act came into force in November 2022 and brought with it some fundamental changes to the structure of Belize’s judicial system. Our Court’s early interpretation of the Senior Courts Act reveals a shift in the High Court’s jurisdiction to intervene in matters relating to civil appeals. Under the Senior Courts Act, the Court of Appeal now enjoys exclusive jurisdiction to grant leave to appeal and to make orders in relation to the service of a Notice of Appeal.”

[4] In arriving at this decision, the judge applied ***Best Buy Limited v Dwight Flowers***¹ and reasoned that:

“While this Application does not pertain to a leave application, I note that service of a Notice of Appeal is also a matter incidental to, or is made for the purpose of the hearing and determination of a civil appeal. Issues surrounding the service of a Notice of Appeal are included among the powers given to the Court of Appeal under section 199(1) of the Senior Courts Act.”

[5] The Applicant, by way of notice of motion dated 3rd May 2023, applied to this Court for an extension of time and/or for substituted service. Consequently, the Respondent applied to strike out the notice of appeal for failure to serve within the time prescribed by rule 4(2) of Order II of the **Court of Appeal Rules**.

Issue

[6] The singular issue raised on this application is whether the Applicant ought to be granted an extension of time. In determining this issue, the Court will also consider whether under the **Senior Courts Act**, the High Court has jurisdiction to extend the time for the service of a Notice of Appeal, or to grant leave for substituted service, or whether such jurisdiction is vested exclusively in this Court.

Analysis

[7] In a nutshell, counsel for the Applicant, Mrs. Myles, argued that pursuant to section 202(3) of the **Senior Courts Act** and Rule 4(2) of Order II, this Court is seized with the power to grant an application for an extension of time. Mrs. Myles submitted that the principles which ought to guide

¹ A decision which is currently on appeal before this Court.

the exercise of the court's discretion in granting such an application were judicially recognised in ***The Attorney General of Belize v Olivia Sylvia Villanueva***.² The Court must consider the length of the delay; the reasons for the delay; the prospects of success on an appeal and the degree of prejudice to the parties.

- [8] According to Mrs. Myles, the application for extension of time was made promptly to the High Court on 27th December 2023. She submitted that there was no intentional delay in making the application to this Court as the application was made to the High Court under the genuine belief that the High Court had the power to entertain the application. On receiving the judge's ruling on 2nd May 2023, she applied to this Court on 3rd May 2023 to extend the time. Further, she stated that the fact that a stay of execution of judgment was granted by the learned judge pending appeal suggests that the appeal is meritorious. She submitted that by extending the time for service of the Notice of Appeal the respondent would suffer no prejudice.
- [9] Counsel for the Respondent, Mr. Saldivar, quite properly conceded that the **Senior Courts Act** included a specific provision which grants the Court of Appeal the power to extend time for service of the Notice of Appeal. However, he urged the Court to dismiss the Applicant's application on the basis that the Applicant had not satisfactorily met the threshold requirements for the grant of an extension of time. He submitted that there has been an inordinate delay in the Appellant applying to the proper court for an extension of time and the fact that the Applicant inadvertently chose the wrong forum to make the application is not a good reason for the inordinate delay. On the point of prejudice, he argued that the Respondent would be prejudiced by the grant of the application as he would be further deprived of the fruits of his judgment.
- [10] Relying on ***Sharryn Dawson v Central Bank of Belize***,³ Mr. Saldivar went on to argue that the appeal was not properly before the Court as the Applicant failed to obtain permission to serve the Notice of Appeal out of time. Consequently, he submitted that the Court ought to strike the notice of appeal.

² Civil Appeal No. 5 of 2021.

³ Civil Appeal No. 18 of 2015.

[11] It is of significance that during oral arguments before this Court, Mr. Saldivar conceded that the application for extension of time should be granted. He accepted that the judge below was vested with the power to determine the application and ought to have done so.

[12] It is the law that this Court is vested with the power to enlarge the time limits imposed by any provision of the Senior Courts Act. Section 202(3) provides:

“The Court may, subject to such terms and conditions as it thinks fit, enlarge the time limits mentioned in subsections (1) and (2) or any provision that imposes a time limit herein, upon such terms as the justice of the case may require, and any such enlargement may be ordered although the application for the enlargement of time is not made until after the expiration of the time appointed or allowed under sub-sections (1) or (2), or the Court may direct a departure from this in any other way where this is required in the interests of justice.”

[13] I will now consider whether the Applicant has met the threshold requirements for the grant of an extension of time. This area of law has been well-settled. As I recently observed in ***The Attorney General of Belize and others v Jose Ical on his own behalf and on behalf of the Maya Village Jalacte Estevan Caal***,⁴ the Court of Appeal Rules do not prescribe the factors that the Court should take into consideration in determining whether it is in the interest of justice to grant an extension of time. However, I am mindful, that there are a number of decisions by judges of this Court, addressing the principles to be applied when considering such an application generally. In ***AG of Belize Minister of Natural Resources v Villanueva***, this Court highlighted the matters which must be considered in the exercise of its discretion. As Mrs. Myles correctly pointed out, they are (1) the length of the delay; (2) the reasons for the delay; (3) the chance of success; and (4) the degree of prejudice.

Length of the Delay

[14] The delay in this matter is about five months. Service of the Notice of Appeal was to be effected within seven clear days of the filing of the Notice of Appeal on 20th December 2022. The application seeking an extension of time to serve the notice was filed with this Court on 3rd May 2023, a day after the judge below rendered her decision on the application. Perhaps what is more telling is that the initial application, which was made to the High Court, for an extension of time was filed on 27th December 2022,⁵ within the seven days of filing of the Notice of Appeal. Clearly, a significant period of time elapsed between the delivery of the decision and the filing of this

⁴ Civil Appeal No. 2 of 2021.

⁵ The application was amended on 27th February 2023.

application, but the more critical issue is whether this period of time can be explained. This brings me to the next consideration, whether the reasons for the delay are good and substantial.

Reasons for the delay

[15] The reason given for the delay by Mrs. Myles is that she was under the genuine belief that the High Court had jurisdiction to hear and determine an application for an extension of time to serve the Notice of Appeal. The Amended Affidavit of the Applicant in support of the application for extension of time,⁶ outlines the steps taken to personally serve the Respondent within the requisite 7-day period. Given that the Respondent could not be located before the expiration of the 7-day period, Mrs. Myles made an application to the High Court seeking an extension of time to serve the Notice of Appeal. The application was heard on 23rd March 2023 and on 2nd May 2023, the learned judge gave a ruling wherein she found that she did not have jurisdiction under the **Senior Courts Act** and the newly amended Court of Appeal Rules to grant an extension of time. By the next day, Mrs. Myles applied to this Court for an extension of time.

[16] By this explanation, the Applicant suggests that he could have done nothing more than await the ruling of the High Court which he thought was the proper course of action to adopt in light of rules 16 and 17 of Order II of the Court of Appeal Rules. The Court has consistently held that an error of law does not necessarily constitute a good reason for delay.⁷ However, the question for this Court is whether there was at all an error of law committed by the Applicant in applying to the High Court for an extension of time. For reasons, which I will set out below, I am of the view that no error of law was committed by the Applicant in applying to the High Court for an extension of time.

[17] It is appropriate that I make the following observations on the newly enacted **Senior Courts Act** at this juncture. It is the case that the **Senior Courts Act** in Belize replaced both the **Supreme Court of Judicature Act** and the **Court of Appeal Act**, which was last amended on 15th September 2021. However, it is notable that the language in rules 16 and 17 of Order II of the Amended Court of Appeal Act, which specifically deals with applications made before a single judge and before a judge of the Court, is identical to that of rules 16 and 17 of Order II of the Court of Appeal Rules in the **Senior Courts Act**.

⁶ Filed on 3rd May 2024.

⁷ *Armand Nano v the Attorney General of Saint Vincent and the Grenadines and Thierry Nano v the Attorney General of Saint Vincent and the Grenadines* SVGHCVP2002/0015.

[18] Prior to the amendment of the Court of Appeal Act in September 2021, the rules contained no specific provision for the extension of time in which to serve a notice of appeal. This was made clear by this Court in **Sharryn Dawson v Central Bank of Belize** where Sir Manuel Sosa P expressed doubt on the approach taken in **Derek Aikman v The Belize Bank Ltd**,⁸ that the power conferred by Order II Rule 3 to extend the time for filing the appeal must necessarily include a concomitant power to extend the time for taking the merely procedural step of serving the notice of appeal. At paragraph 4 he stated that:

“Putting my difficulty at its simplest, I am quite unable to accept that a provision expressly providing for an extension of time in which to file a notice of appeal must be construed as providing, by necessary implication for an extension of time in which to serve a copy of such a notice. To my way of thinking, it is more logical to say that, if the rule maker had wanted the Rules to provide for extensions of the latter kind, he/she would have included in the Rules a rule expressly so providing.”

[19] Following **Sharryn Dawson v Central Bank of Belize**, the Court of Appeal Act was later amended, particularly rule 16(3) which is relevant to the jurisdiction of this Court and the court below to make orders including that of an extension of time. This Court considered the amended rules in the **Attorney General of Belize v Olivia Sylvia Villanueva**, where it had to determine the issue of whether the Court of Appeal had the jurisdiction to make an order for an extension of time for service of the notice of appeal. The Court accepted that, by virtue of section 16(3), it may exercise its discretion and enlarge the time limits.

[20] I shall now turn to rules 16 and 17 of Order II of the Court of Appeal rules in the **Senior Courts Act**, which provides that:

“16. In any cause of matter pending before the Court, a single judge of the Court may upon application make orders for-

- (a) Giving security for costs to be occasioned by any appeals;
- (b) leave to appeal in forma pauperis;
- (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
- (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
- (e) extension of time.

And may hear determine and make orders on any other interlocutory application”

⁸ Civil Appeal No. 12 of 1992.

“17 (1) – Applications referred to in rule 16 shall ordinarily be made to a judge of the Court but where this may cause undue inconvenience or delay, a judge of the court below may exercise the powers of a single judge of the Court under that rule.

(2) The Registrar of the Court below shall send to the Chief Registrar one copy of any application made to a judge of the court below and of the order made thereon.”

[21] This provision is cast in crystalline clear terms and admits of no ambiguity. A judge of the court below may exercise the powers of a single judge of the Court of Appeal where undue inconvenience or delay may be occasioned. In a word, applications listed in rule 16 should ordinarily be made to the Court of Appeal unless this would cause undue inconvenience or delay. It would fall to the applicant to lead evidence to establish that the making of the application to the Court of Appeal would have caused inconvenience or delay thus justifying making the application to the court below.⁹ What constitutes undue inconvenience or delay is a question of fact and should be decided on a case-by-case basis.

[22] In considering section 28(1) of the Eastern Caribbean Court of Appeal Rules, which is in pari materia to section 16 of the Belize Court of Appeal Rules, Thom J in **Andrew Popely (Representing the interests of the beneficiaries of Blue Ridge Trust) v Ayton Limited Corporate Directors Limited St. Vincent Trust Services Limited Lex Services Limited**¹⁰ found it appropriate for an application to be made to the court below in circumstances where an appeal was filed on 12th November 2012 and the Court of Appeal was not due to sit in St. Vincent until February 2013. Thom J took into consideration that the Eastern Caribbean Court of Appeal is an itinerant Court with its Headquarters in St. Lucia.

[23] It follows therefore the High Court judge is vested with jurisdiction under the **Senior Courts Act** to hear and determine such applications, including applications for extensions of time to serve the notice of appeal. However, this jurisdiction should only be exercised where the applicant has satisfied the court that there would be undue inconvenience and delay if he were to make his application before the Court of Appeal. Contrary to the judge’s finding, there is nothing in the **Senior Courts Act** which states that such applications are within the exclusive jurisdiction of the Court of Appeal.

⁹ Agnes Khoury v Charles Khoury ANUHCV2015/0076.

¹⁰ SVGHCV2005/0001.

[24] I find that the applicant's reasons for the delay in applying for an extension of time are sufficient to justify delay. It was completely open to the applicant to invoke the jurisdiction of the High Court if he felt that applying to the Court of Appeal would have caused undue inconvenience and delay.

[25] Further, the Applicant did act with some expedition, by applying to the Court of Appeal, once it was notified of the refusal of his application by the judge below.

Prospects of success

[26] On the face of the nine grounds of appeal contained in the draft notice of appeal, the Applicant has more than a fanciful chance of succeeding in the appeal. Further, the learned judge in granting the application for a stay of execution of the judgment commented at paragraph 4 of the judgment, that: "the appeal raises questions of law and facts which are not frivolous or fanciful, and there is a risk that the appeal be rendered nugatory should the properties at issue be disposed of, or their value be affected in any way by the conduct of the Respondent." Additionally, for what it is worth, the respondent has made no submissions on the merits of the Applicant's grounds of success.

[27] In the circumstances, I am of the view that the applicant has good prospects of succeeding on appeal.

Prejudice to respondent

[28] With respect to prejudice, I cannot say that the degree of prejudice to the respondent is obviously substantial. The judge has ordered a stay of execution of the judgment which has not been appealed and by this order the Respondent would be unable to reap the fruits of his judgment.

Conclusion

[29] This is a case where a delay in filing the Notice of Appeal occurred. However, there was a good reason for the delay and there is a good prospect of success on appeal. I am therefore of the view that the Applicants would face greater prejudice by being deprived of the right of appeal.

[30] For the reasons advanced and in light of the concession made by counsel for the Respondent, it has become unnecessary to address the Respondent's strike out application.

[31] I would therefore make the following orders:

1. The application for extension of time to serve the notice of appeal is granted by consent.
2. Service of the notice of appeal is deemed to have been made on 4th January 2023.
3. The strike out application is dismissed.
4. Time for all other proceedings in the appeal shall run from 25th October 2023.
5. Each party shall bear their own costs.

Foster JA
Justice of Appeal

[32] I concur.

Bulkan JA
Justice of Appeal

[33] I concur.

Arana JA
Justice of Appeal