

~~P.C.~~  
~~G.M.H.G.S.~~

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
23 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

*Judgment*  
*50/1964*

IN THE PRIVY COUNCIL

78699

*No 41 of 1962*

O N A P P E A L

FROM THE SUPREME COURT OF THE FEDERATION  
OF MALAYA  
IN THE COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N :-

THAMBOO RATNAM ... Appellant

- and -

- 1. THAMBOO CUMARASAMY
  - 2. CUMARASAMY ARIAMANY d/o  
KUMARASA
- Respondents

C A S E FOR THE RESPONDENTS

SLAUGHTER AND MAY,  
18, Austin Friars,  
London, E.C.2.

Respondents' Solicitors.

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B E T W E E N :-

THAMBOO RATNAM                    ...                    Appellant

- and -

1. THAMBOO CUMARASAMY  
2. CUMARASAMY ARIAMANY  
10                    d/o KUMARASA                    ...                    Respondents

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CASE FOR THE RESPONDENTS

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1. This is an Appeal by leave of the Court of Appeal at Kuala Lumpur in the Federation of Malaya (now Malaysia) from an Order of the Court of Appeal dated 15th May 1962. By the said Order the Court of Appeal dismissed with costs a Motion by the Appellant dated the 18th April 1962 for an order to extend the time for filing the Record of an Appeal from the judgment of the Honourable Mr. Justice Ong herein given on the 3rd February 1962 whereby the action by the Appellant against the Respondents herein was dismissed with costs. p.25 ll.1.-27  
p.8 l.20-  
p.9 l.18  
p.4 ll 1-20
- 20 2. The circumstances which gave rise to the Appellant's claim against the Respondents and to the Order of the Court of Appeal, and to this Appeal, are hereinafter in this Case set out.
- 30 3. In this Action the Appellant claimed against the First Respondent (his brother) and the Second Defendant (his brother's wife) to dispossess them of half their interest in certain properties in Kuala Lumpur, on the ground that they were

purchased with the joint savings of himself and the First Respondent. The action was heard by the Honourable Mr. Justice Ong, and was dismissed by the said judgment of the 3rd February, 1962.

4. After the Record of this Appeal was agreed in Malaysia, the Respondents' Solicitors in London drew the attention of the Appellant's Solicitors to the fact that it did not include the said judgment of Mr. Justice Ong, and invited them to agree to the addition of the judgment to the Record. Notwithstanding the provision in Rule 16 of the Judicial Committee Rules 1957 that "the reasons given by the judge or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the appeal arises" shall be included in the Record, the Appellant's Solicitors refused to agree to this suggestion. Accordingly the said judgment does not form part of the Record, and the Respondents therefore do not feel themselves at liberty, as they would otherwise have done, to refer in this Case to the reasons given by Mr. Justice Ong for dismissing the Appellant's claim or to the facts out of which the Appellant's claim arose.

p.1.11.17-33

5. On the 2nd March 1962 the Appellant gave notice of appeal to the Court of Appeal in Kuala Lumpur against the whole of the decision of Mr. Justice Ong, and the Appeal was entered in the List of Civil Appeals on the 3rd March 1962.

p.2.11.1.-25

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6. By virtue of Order 58 Rule 22 (1) and (4) of the Rules of the Supreme Court 1957 of the Federation of Malaya, a party appealing to the Court of Appeal is required to prepare a Memorandum of Appeal setting out the grounds of objection to the decision appealed against, and to append to the Memorandum copies of the proceedings in the Court below, including:

(a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;

(b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given;

(c) copies of all affidavits read and of all documents put in evidence in the Court below so far as they are material for the purposes of the appeal, or if such documents are not in the English language copies of certified translations thereof;

(d) a copy of the judgment, decree or order appealed from;

10 (e) the certificate, if any, given by the Judge of the grounds of his judgment or order or, if a written judgment was delivered, a copy thereof;

(f) a copy of the notice of appeal.

7. By virtue of Order 58 Rule 22 (6) of the said Rules as amended by Rule 5 (3) of the Rules of the Supreme Court (Amendment) Rules, 1960 of the Federation of Malaya, an appellant to the Court of Appeal is required to file the said Memorandum and documents (together called the Record of Appeal) at the place where the Appeal was entered within six weeks after the entry of the Appeal or within such further time as the Court of Appeal may allow. Order 58 Rule 25 (3) of the said Rules provides as follows:

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"If any part of the record of appeal is not filed, or any copy thereof is not supplied, within the prescribed time, and no sufficient ground is shown for the delay, the appeal may be dismissed."

30 8. Accordingly, it was necessary for the Appellant to file his Record of Appeal within six weeks after 3rd March, 1962, namely on or before 14th April 1962.

9. On 15th March 1962 the Registrar of the Court of Appeal wrote to the Registrar of the Supreme Court, Kuala Lumpur, notifying him that the Appeal was fixed for hearing at the sitting of the Court of Appeal at Kuala Lumpur commencing on 20th August 1962, and drawing attention to the fact that the Record of Appeal was required to be filed at the Registry on or before the 14th April, 1962. Copies of this letter were sent to the Appellant and to the Solicitors for the Respondents.

p.3 11.1.-50

p.3 11.27-50

10. The Appellant did not file a Record of

Appeal at the Registry at Kuala Lumpur (or elsewhere) on or before the 14th April, 1962 or at any time.

- p.4 ll.1.20 11. On the 18th April 1962 (namely four days after the expiry of time for filing the Record of Appeal) the Appellant gave notice that the Court of Appeal would be moved for an Order that the time for filing the Record of Appeal be extended to 14 days from the date of the Order to be made on the said Motion. 10
- p.4 l.22-  
p.5 l.19. 12. The said Notice of Motion was supported by an Affidavit of the Appellant sworn and filed on the 18th April 1962, deposing that -
- (1) he first instructed his present solicitors to act for him on the 13th April at 11.30 a.m.
- (2) his present solicitors explained to him that it would not be possible to file the record of Appeal within the time limited; namely on or before the 14th April. 20
- (3) he had not instructed his solicitors earlier nor had he taken any other action with regard to the Appeal as he had hoped that some compromise might be reached between the parties.
- p.5 l.20-  
p.6 l.14 13. In opposition to the said Motion the First Respondent filed on behalf of himself and the Second Respondent an Affidavit dated the 10th May 1962 deposing that -
- (1) as Judgment was given by Mr. Justice Ong on the 3rd February 1962 the Appellant had ample time to instruct his Solicitor and to file his Record of Appeal; 30
- (2) the Appellant did not at any time after the date of Judgment or before agree to compromise any matter in issue in the suit nor had approached the Respondents with a view to a compromise.
14. On the 15th May 1962 the said Motion was heard by the Court of Appeal (Chief Justice Thomson, Mr. Justice Hill (Judge of Appeal) and Mr. Justice Good (Judge of Appeal). The said Motion was argued by counsel on both sides. 40

15. At the said hearing the parties advanced the arguments set out in the said Affidavits. In addition p.6 1.17-  
p.8 1.19
- (1) Counsel for the Appellant relied upon the fact that an Order extending the time for filing the Record of Appeal would not have involved an extension of the date for hearing, and undertook to file the Record by the 31st May 1962 if leave was granted. p.7 11.29-33
- 10 (2) Counsel for the Respondents relied on the fact that the Appellant was represented in the lower court, and contended that although the Court had discretion to extend the time for filing the Record, there must be circumstances to justify its exercise in favour of the Appellant. p.8 11.1.-8
16. At the end of the hearing of the Motion the Court of Appeal dismissed the motion with costs. p.6 11.28-29  
p.7 1.14  
p.8 1.9  
p.8 1.20-  
p.9 1.18
- 20 17. On the 14th June 1962 the Appellant gave notice that the Court of Appeal would be moved for an order that conditional leave to appeal to the Yang di-Pertuan Agong be given to the Appellant against the whole of the Order of the Court of Appeal given on the 15th May 1962. p.9 11.20-38
- After hearing argument on the motion on the 2nd July 1962 on the question whether the said Order of the Court of Appeal was a final or interlocutory order, the Court of Appeal held p.12 1.22-  
p.16 1.28
- 30 in reserved judgments delivered on the 18th July 1962 that the said order was a final order and that consequently (subject to certain conditions as to which there was no dispute) the Appellant was entitled to appeal to the Yang di-Pertuan Agong as of right under section 3 (1) (a) of the Appeals from the Supreme Court Ordinance 1958 (No. 16 of 1958). p.16 1.30  
p.24 1.40
- In fold.
18. On the 15th October 1962 the Court of Appeal granted final leave to the Appellant to appeal to the Yang di-Pertuan Agong from the said Order of the 15th May 1962. p.25 11.1-33
- 40 19. The Respondents respectfully submit that the judgments of the Court of Appeal were right, for the following reasons:
- (i) An affidavit in support of an application of this nature should set out

in detail the reason why the procedural step in question was not taken within the prescribed period: cf. Weldon v. de Bathe (1887) 3 T.L.R. 445, per Lord Justice Bowen at p.466.

- p.4 1.21-  
p.5 1.19 (ii) The Appellant's Affidavit gave only two alleged reasons for the delay, but neither of these was stated in any detail or supported by any such explanation or amplification as would in the Respondents' respectful submission have been necessary to justify the Court of Appeal in exercising its discretion to extend the time. 10
- p.4 11.27-33 (iii) The first reason was that the Appellant first instructed his present Solicitors on the 13th April and that the Solicitors explained to him that it would not be possible to file the Record on or before the 14th April. The Appellant was, however, represented by Counsel at the hearing before the Honourable Mr. Justice Ong. The Appellant's Affidavit does not state when he ceased to be so represented but Notice of Appeal against the decision of the Honourable Mr. Justice Ong had been given by or on behalf of the Appellant on the 2nd March 1962. 20
- p.7 1.13  
p.8 11.2-3
- p.1 11.16-33
- p.4 11.34-38 (iv) The Appellant's second alleged reason for omission to file the Record was that he had not instructed Solicitors earlier nor taken any other action with regard to the Appeal as he had hoped that a compromise might be reached. As to this reason the Respondents respectfully make the following submissions: 30
- p.5 11.34-39 (a) The Appellant did not allege in his Affidavit that his hope of a compromise resulted from anything said or done by the Respondents, or that he had made any approach to the Respondents with a view to a compromise, and the First Respondent has stated on Affidavit that no such approach was made. This has not been challenged by the Appellant. In these circumstances the Respondents respectfully submit that there was insufficient evidence to support the Appellant's allegation that his delay 40

was attributable to his hope of achieving a compromise.

10 (b) Furthermore, even if it were to be accepted that the Appellant hoped for a compromise, this would not (in the Respondents' respectful submission) excuse his failure to file the Record. It is respectfully submitted that a mere subjective hope of a compromise in the mind of the Appellant, unsupported by any fact which might give some basis of reality to this hope, is not a ground on which the Court of Appeal could properly have relied in order to exercise its discretion to extend the time. Further, it is to be noted that there is no evidence to suggest that the remainder of the Record would have been so voluminous that its preparation would have been lengthy or expensive. The Appellant's Notice of Appeal was not filed until one month after the trial, with the result that the Appellant had a total of 10 weeks within which to prepare the Record. The Respondents respectfully submit that this was ample time for the purpose, and that in view of the substantial sums in issue in the action, the prudent and practicable course would have been to begin the preparation of the Record no later than the date on which Notice of Appeal was given.

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40 (c) Alternatively, if the Appellant did not wish to incur the expense of preparing the Record until the possibility of a compromise had been explored (but there is no evidence of this) it is respectfully submitted that he should have applied either to the Court or to the Respondents, before the 14th April, for an extension of the time for filing the Record.

50 (v) The Respondents respectfully draw attention to the fact that the Appellant's Affidavit did not allege that before instructing his present Solicitors on the 13th April he had been unaware that the Record of Appeal had to be filed on or before the 14th April. On the contrary, the Appellant had been notified of this fact by letter dated the 15th March.

p.4 1.22  
p.5 1.18

p.3 11.1-50



20. For the foregoing reasons the Respondents respectfully submit that the Appellant failed to make out any or any sufficient case for a retrospective extension of the time for filing the Record, and that the decision of the Court of Appeal was therefore correct.

21. The Respondents will if necessary submit in the alternative that the decision of the Court of Appeal as to the exercise of its discretion under Order 58 rule 22 (6) (as amended) was not so manifestly incorrect that their Lordships' Committee should interfere. It is well settled that an appellate Court will not interfere, in matters within the discretion of the Court below, unless satisfied that the discretion was exercised on a wrong principle or that there has been a miscarriage of justice: Golding v. Wharton Saltworks Co. (1876) 1 Q.B.D. 374; Mangan v. Metropolitan Electric Supply Company [1891] 2 Ch.551; Evans v. Bartlam [1937] A.C. 473, at pp. 480 - 1, 482, 486; Charles Osenton and Company v. Johnson [1942] A.C. 130; Halsbury's Laws of England, 3rd Edn. Vol. 30, p.452. The appellate Court starts with the presumption that the judge has rightly exercised his discretion, and must not reverse the judge's decision on a mere "measuring cast" or on a bare balance; Charles Osenton v. Johnson, supra, per Lord Wright at p.148

22. The principle that an appellate Court will not lightly interfere with the discretion of the judge is strictly applied in cases where the discretion relates to matters, such as the date place and mode of trial, which are within the scope of the judge's direct administrative control over the case. Thus, in Sackville West v. Attorney-General (1910) 128 L.T. Journ. 265 the statement is made in the judgment of the Court of Appeal (the Master of the Rolls (Lord Cozens-Hardy), Lord Justice Moulton and Lord Justice Buckley) that "it would only be in the most extraordinary circumstances that an application to review the decision of the learned judge as to the conduct of the business in his own Court could succeed...." The passage of which these words form part was cited and applied by the Court of Appeal (Lord Hanworth M.R. Lord Justice Atkin and Lord Justice Lawrence) in Maxwell v. Keun [1928] 1 K.B.645.

23. The Respondents respectfully submit that

the application of the principle stated in Sackville West v. Attorney General (supra) is reinforced in the present case by the fact that on previous occasions Your Lordships' Board has been reluctant to interfere with the exercise of discretion on the part of inferior Courts overseas: Baldwin v. Baldwin (1922) 91 L.J.P.C. 208; Odlum v. City of Vancouver (1915) 85 L.J. P.C. 95; Halsbury's Laws of England, 3rd Edn. Vol.9, p.394.

10 24. In the present case, the Respondents accordingly respectfully submit that -

(i) the Court of Appeal did not misdirect itself in exercising its discretion;

(ii) the dismissal of the Appellant's Motion did not cause injustice to the Appellant, because the delay in filing the Record resulted from his own inaction and not from causes beyond his control.

20 25. The Respondents therefore respectfully submit that this Appeal should be dismissed with costs for the following (amongst other)

#### R E A S O N S

- (1) BECAUSE there are no or no sufficient grounds for interfering with the Court of Appeal's exercise of discretion in refusing to extend the Appellant's time for filing the Record of Appeal
- 30 (2) BECAUSE the Appellant's Affidavit disclosed no sufficient explanation for his omission to file a Record of Appeal within the prescribed period.
- (3) BECAUSE there were no or no sufficient grounds for granting a retrospective extension of the time for filing the Record of Appeal.
- (4) BECAUSE the Court of Appeal did not misdirect itself in dismissing the Appellant's motion.
- (5) BECAUSE the dismissal of the Appellant's motion involved no injustice to the Appellant.
- 40 (6) BECAUSE the Order appealed from is right and should be affirmed.

MICHAEL KERR  
M.J. MUSTILL