IN THE SUPREME COURT OF BELIZE A.D. 2008

ACTION NO. 11 OF 2006

BETWEEN: MITCHELL SOMMERVILLE APPLICANT

AND

BRUCE SANCHEZ RESPONDENT

Before: Hon Justice Sir John Muria

20 October 2008

Mr. O. Twist for Applicant
Mrs. M. Balderamos-Mahler for Respondent

JUDGEMENT

MURIA J. This is an application by the applicant for Leave to Appeal out of time against the decision of the Magistrate, Belize Judicial District given on 9th December 1997. The application was filed on 13 February 2006. However, the matter has not been dealt with since then.

The application was made pursuant to the *Order 73 rule 9* of the old Supreme Court Rules. Two grounds for the application are stated in the application, namely, that the applicant was unavoidably prevented from appealing within the prescribed time, and that he has a good defence in law. In support of his application the applicant relied on his affidavit sworn to and filed herein on 13 February 2006. I feel that this application can be dealt with briefly.

On the ground that the applicant was unavoidably prevented from appealing, the basis for that ground is said to be paragraphs 13 and 14 of the applicant's affidavit where he states:

> *"13. That because of the negotiation between my Attorney and the Respondent's*

Attorney I verily believe that the matter could have been resolved amicable without the need to appeal therefore I did not see it fit at the time to apply for leave to file Notice of Appeal out of time.

14. *Since it would appear that there is no possibility of settling the matter and if the matter comes up before the Court, I would be condemn to make the payment based on my confession, I humbly request this honourable court grant me leave to file a Notice of Appeal out of time in that I was unavoidably prevented from doing so owing to the fact that from the time the confessions were signed in 1997 I did not hear anything about the matter until the Judgment Summons in June 2000 and July, 2001 and even then further negotiation was going on between the Respondent and my Attorney.*

Mr. Twist of Counsel for the applicant, unreservedly relied on the abovementioned paragraphs to show that there were negotiations between the applicant's attorneys and respondent's attorneys with a view to resolving the matter. As a result of those negotiations, says Counsel, the applicant was unavoidably prevented from appealing. In support of his argument, Counsel referred to the cases of ***Arturo Matus –v- Alfred Mechado*** (14 May 1993) Court of Appeal of Belize Civ. App. No. 4/1992 and ***Martin –v- Chow*** (1984) 34 WIR 379. Counsel also sought to rely on the Jamaican Case of ***Aris –v- Chin*** (1972) 12 J.L.R 929.

The case of ***Arturo Matus*** is concerned with an appeal from Supreme Court to the Court pursuant to section 17 of the Court of Appeal Act. The relevance of that case to the present case is on the construction of the words "*unavoidably prevented*" from filing the Notice of Appeal. The Court of Appeal stated that the applicant must show that he has been unavoidably prevented from filing his Notice of Appeal. The Court went to reiterate its earlier decision in ***In The Matter of Order II Rule 3 of the Court of Appeal Rules AND In the matter of an Application for Extension of Time with which to appeal*** (25 May 1983) Court of Appeal of Belize, where the Court said:

> *"The words 'unavoidably prevented' are clear and do not cover a case of oversight, lack of diligence or even negligence and tardiness on the part of a solicitor."*

The Court of Appeal has thus authoritatively decided what the words "*unavoidably prevented*" mean. It goes without saying, of course, that the principle stated by the Court of Appeal must be applied to the particular circumstances of each case.

In ***Arturo Matus*** there was an error on the part of the appellant's attorney, compounded by the lack of objection on the part of the respondent's Attorney and further compounded by the Supreme Court's acquiescence, in allowing the application for leave to appeal to be made when none was required. It resulted in the filing of the Notice of Appeal out of time when it came to be filed. The Court of Appeal allowed extension of time for the appellant to file his Notice of Appeal.

In the case of ***In the Matter of Order II Rule 3 of the Court of Appeal Rules***, the applicant was away overseas when judgment was delivered on 11th October 1982. He was notified of the judgment by his former solicitor only when he returned to Belize on 10th March 1983. This was despite the fact that the applicant had left, both his local and foreign, mailing addresses with his former solicitor. Upon receiving a copy of the judgment, the applicant gave instructions to his new solicitor to pursue an appeal against the Supreme Court's decision. The former solicitor filed an affidavit to the effect that he tried to communicate with the applicant, but he was unable to reach him. The Court of Appeal found that the actions of the applicant and his solicitors fell short of satisfying the Court that the applicant had been "*unavoidably prevented*" from filing his Notice of Appeal.

In the present case, the only reason for the delay in filing the Notice of Appeal was the purported negotiations between the Attorneys for the applicant and respondent. That

clearly, must also fall far short of satisfying this Court that the applicant was "*unavoidably prevented*" from filing a Notice of Appeal. This ground is rejected.

The second ground of application can be disposed of briefly. The defence relied upon by the applicant is that Section 5(1) of the ***District Courts (Procedure) Act*** (cap.97) prohibits divisions of a cause of action into two or more actions, so as not to exceed the $5,000.00 limit for bringing an action in the inferior court. There are two downfalls of this ground. First, the applicant here had two separate causes of action, one arose on 15th September 1997 for grocery delivered to the applicant, Suit No. 1455/97, and the other arose on 5th November 1997, also for grocery delivered to the applicant, Suit No. 1456/97. The fact that the actions were filed on the same date with Court fees also paid on the same date and receipt, did not make the two causes of actions into one, totaling $10,000.00 which would then be caught by the above provision. Section 5(1) of the Act only prohibits one cause of action splitting into two or more actions. That is not the case here.

The second point against the applicant is that Section 107(a) of the ***Supreme Court of Judicature Act*** (cap.91) does not permit the applicant to appeal against the decision of an inferior Court since he confessed or admitted the claims against him in this case. There was suggestion by the applicant in his affidavit that the confession were not his. Unfortunately for the applicant, there was no challenge by him against those confessions or admissions in 1997 when judgments were issued against him nor was there any challenge in 2000 and 2001 when Judgment Summons were issued against the applicant. The only course taken by the applicant then was to find ways to amicably settle the amounts owing to the respondent.

The challenge to the confession or admission was first raised in 2006 when the applicant issued this application, some nine (9) years later. This is too late in the day to challenge those confession or admission, let alone persuading this Court to exercise its discretion to grant leave to appeal or extend time to file notice of appeal. It has long been held that

delay is an important factor affecting the exercise of the Court's discretion, as it does in this case.

This case is clearly one where leave to appeal out of time or even an extension of time to file Notice of Appeal must be refused.

The application is refused with costs to be taxed if not agreed.

Sir John Muria