

AD v AE
[2004] SGCA 15

Case Number : CA 118/2003
Decision Date : 07 April 2004
Tribunal/Court : Court of Appeal
Coram : Chao Hick Tin JA; Tan Lee Meng J
Counsel Name(s) : Nicholas Cheong (Lim Soo Peng and Co) for appellant; David Rasif (David Rasif and Partners) for respondent
Parties : AD — AE

Civil Procedure – Appeals – Notice – Whether extension of time to serve Notice of Appeal should be granted – Whether discretionary power to extend time should be exercised differently where substantive appeal involved custody of child

7 April 2004

Chao Hick Tin JA (delivering the judgment of the court):

1 This was an appeal against a decision of the High Court granting the respondent's application for an extension of time to serve a notice of appeal, against a district court order relating to a custody matter, out of time. We allowed the appeal with costs to the appellant, here and below. We now give our reasons.

The background

2 This appeal raised once again the perennial problem as to the circumstances under which the court should extend time to enable a party to file and/or serve a notice of appeal out of time. In particular, it also raised the question whether, where the subject matter of the proposed appeal relates to the issue of the custody, care and control of a child, there is a somewhat more enlightened regime governing the granting of such an extension of time.

3 The appellant was the husband and the respondent, the wife, and they shall be so referred to in this judgment. The parties were married in September 1991. On 29 November 2000, the husband petitioned for divorce on the ground of the wife's adultery. A *decree nisi* dissolving the marriage was granted on 20 March 2001. The parties agreed on other ancillary matters except in respect of the custody of three children: the two oldest are girls, X and Y, born on 5 January 1995 and 14 November 1996 respectively; the youngest, a son, C, was born on 6 May 1998.

4 However, following disclosures made by the wife, and subsequent DNA tests carried out, the district judge found that the husband was not the biological father of X and Y. As a result of this discovery, the two girls suffered an identity crisis and having regard to their views, the district judge ordered that it would be in their interest to be in the custody of their mother, with no access to the father. The district judge gave no access to the father in order to ensure that there would not be any accusation of the sort as alleged by the wife regarding an incident which was said to have happened on 27 October 2002. As regards the son, the district judge, having noted the close bond between father and son and the express wishes of the son, granted custody of him to the father, with weekend access to the mother. These orders of the district judge were made on 26 May 2003.

5 On 11 June 2003, the wife issued a notice of appeal against the orders made by the district judge, particularly in relation to the order granting custody of the son to the husband. However the

notice was not served on the husband's solicitors until 6 August 2003 when her solicitors faxed a copy of it over to the husband's solicitors. Objection was immediately taken on this late service, a delay of some 49 days. Moreover, it was only on 29 August 2003 that the wife took out an application to court for an extension of time to serve the notice of appeal.

6 Under O 55C r 1(4) of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the ROC"), it is expressly provided that the notice of appeal must be issued within 14 days after the order appealed against is given and served on all other parties within seven days of it being issued.

7 The judge who heard the application for an extension of time to serve the notice of appeal granted the request. He agreed that until a notice of appeal was served there was effectively no appeal. But he felt he should extend time in this case because the appeal concerned the welfare of a child. This was what he stated ([2003] SGHC 258 at [4]).

The issue in the substantive appeal concerned the custody of a [five-year-old] child. In such proceedings the welfare of the child is of paramount importance. That is a statutory decree backed by the common law. In such cases, the interests of the parties themselves are secondary to the interests of the child, and for that reason, I exercised my discretion in granting leave to serve the Notice of Appeal out of time. ... Normally, the delay of more than a fortnight would be considered substantial; but in this case, as the substance of the appeal may affect the welfare of the child, I am of the view that an extension ought to be granted.

8 The judge granted the extension notwithstanding the fact that he came to the view that the lapse by the clerk of the solicitors acting for the wife in failing to serve the notice in time was a "poor excuse".

The law

9 Although in this case the notice of appeal was issued within time and only its service was out of time, it is clear that under the ROC, service of the notice is an essential prerequisite for there to have been an appeal. An application to extend time to serve a notice of appeal filed within time is no different in nature from that to extend time to file a notice of appeal out of time as an appeal would only come into being where the notice is both filed and served. Accordingly, an application for an extension of time to serve a notice of appeal out of time should be treated on the same basis as an application to extend time to file a notice of appeal out of time: see *Stansfield Business International Pte Ltd v Vithya Sri Sumathis* [1999] 3 SLR 239 at [26], *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46 ("*Nomura*") and *Denko-HLB Sdn Bhd v Fagerdala Singapore Pte Ltd* [2002] 3 SLR 357 ("*Denko*") at [10].

10 It is settled law, as far as these courts are concerned, that in determining whether an extension of time should be granted to a party to either file or serve a notice of appeal out of time, four factors are to be considered, namely, the length of the delay, the reason for the delay, the chances of the appeal succeeding if the time for appealing is extended and the degree of prejudice to the would-be respondent if the application is granted. This is clear from a line of authorities of our courts: *Hau Khee Wee v Chua Kian Tong* [1986] SLR 484, *Pearson v Chen Chien Wen Edwin* [1991] SLR 212 ("*Pearson*"), *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441 ("*Aberdeen Asset*") and *Nomura*.

Relevant factors

11 The delay in the present case was some 49 days. By any standard, this was a very

substantial delay. As for the reasons of the delay, all that the solicitors for the wife could say was that it was due to "inadvertence" that the notice was not served. This could hardly be a sufficient reason, otherwise it would mean that oversight *simpliciter* would be a good ground to obtain an extension of time. The judge below was quite correct to remark that it was a "poor excuse". As this court observed in *Denko*, where the delay was only 14 days (at [18]):

As we viewed it, the greatest obstacle in the way of Denko's application was in relation to the first two factors. Not only was the length of the delay quite substantial (bearing in mind the prescribed period of time within which a party must apply to the judge for further arguments was only seven days), there were no extenuating circumstances offered for the "oversight" of the solicitor. Some explanation should have been offered to mitigate or excuse the oversight. If, in every case, "oversight" is per se a satisfactory ground, we run the risk of turning the rules prescribing time into dead letters. It would be observed in breach. It would be all too simple for a party to run to a judge to ask for indulgence because of oversight. The need for finality must be borne in mind.

12 We should add that the delay in serving the notice was not the only instance of delay on the part of the wife. Even after the husband's solicitors had pointed out that the service effected on 6 August 2003 was out of time, the wife took her time to apply for an extension of time to serve the notice. It was only done some 23 days later. The wife furthermore took another 12 days to serve the application to extend time on the husband's solicitors. The wife or her solicitors did not seem to appreciate that compliance with timelines was very important.

13 Turning to the other two factors, namely, the merits of the case and the question of prejudice, they were, in the present circumstances, really factors which did not lend much weight in favour of the wife. These were really qualifying factors, the fulfilment of which were essential to enable the court to exercise its discretion. The threshold to satisfy the merit criterion is a relatively low one, *ie*, the appeal must not be hopeless. Here, we would observe that the district judge, in granting custody of C to the husband, also took into account two FAMCARE reports which strongly recommended that custody of C be given to the father as they shared a strong bond. Still, we could not say that the appeal, if permitted to proceed, would be hopeless. As regards the factor of prejudice, this court had in *Aberdeen Asset* explained it thus (at [44]):

The "prejudice" cannot possibly refer to the fact that the appeal would thereby be continued, if the extension is granted. Otherwise, it would mean that in every case where the court considers the question of an extension of time to file notice of appeal, there is prejudice. We endorse the views expressed in this regard by Woo Bih Li JC in *S3 Building Services v Sky Technology* [[2001] SGHC 87]. The "prejudice" here must refer to some other factors, *eg*, change of position on the part of the respondent pursuant to judgment.

14 We recognised that because no notice of appeal was served by 18 June 2003, the husband, as well as the son, were entitled to conduct their lives as though the wife had accepted the order on the custody of the son. By extending time and allowing the proposed appeal to proceed, the husband would run the risk of the first order being overturned and their lives being upset. In the meantime, there could also be emotional turmoil. But we do not think this could be the meaning of prejudice. Some form of irreversible or permanent change of position must have taken place to constitute prejudice.

15 On weighing the four factors as a whole, there was, in our opinion, hardly any sufficient basis for the court to exercise its discretion to extend time to enable the wife to serve the notice out of time.

16 At this juncture we have to allude to one other matter, *ie*, that the husband has, in fact, appealed against the district judge's order to the High Court. He is dissatisfied on two counts. First, custody of the two daughters is given to the wife, with no access to him. Second, the access given to the wife in respect of the son is too much. We do not think the fact that the husband's appeal is still pending should in any way alter the principles which the court should apply to determine whether an extension of time should be granted to the wife in this instance. Moreover, the husband's appeal, as far as the son is concerned, is of a limited nature, it being confined to the extent of access.

17 As mentioned before, the only reason the judge below granted an extension of time to the wife to serve the notice of appeal out of time was because he felt that the subject matter in dispute concerned the question of the custody of a child and the paramount consideration was the welfare of the child while the interests of the parties, the parents, were secondary. In other words, he seemed to be suggesting that there should be a more relaxed rule governing extension of time to file or serve a notice of appeal where the matter involved the custody of a child or children.

Is there a special rule?

18 It would appear that this is the first time that such a proposition was advocated. Order 3 r 4 of the ROC accords a discretionary power to the court to extend the time within which a person is required by the ROC to do any act in any proceedings. The ROC do not make any differentiation, based on the nature of the proceedings, as to how this discretionary power to extend time is to be exercised.

19 In *Vettath v Vettath* [1992] 1 SLR 1 ("*Vettath*"), the court was faced with an application to extend time to file and serve a notice of appeal against orders of the High Court relating to ancillary matters in a divorce proceeding, including orders as to the custody and access to the child. This court applied the four-factor test enumerated in *Pearson* and held that there was insufficient ground for the court to exercise its discretion in favour of the applicant. There was nothing in *Vettath* to suggest that where an appeal related to a custody order, a more liberal regime would apply to enable the dissatisfied spouse to appeal against the orders out of time.

20 *Pearson* was also a case concerning an appeal out of time against certain ancillary orders, but not relating to the custody of a child.

21 We appreciate that in *Pearson* and *Vettath* the court in each case was not specifically asked to address the issue of whether in respect of custody matters the court should be more enlightened towards granting extension of time to enable an appeal being brought out of time. However, we cannot see any reason or logic why the ordinary principles, as to how the court should exercise its discretion to extend time enumerated in [10] above, should not apply to a case just because the subject matter relates to the custody of a child. It is true that under s 125 of the Women's Charter (Cap 353, 1997 Rev Ed), as well as s 3 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), in determining to whom custody of a child should be awarded, the court must bear in mind that the paramount consideration is always the welfare of the child. The court below, (in the present case, the district judge) had applied that principle when it made the order giving custody of the son to the husband. The fact that the wife was unhappy did not mean that there was necessarily any non-observance of that principle by the district judge. Indeed, the district judge expressly stated that in coming to her conclusion she had considered the welfare of the children as paramount. As the High Court judge rightly pointed out, the interests of the parents were secondary.

22 Of course, the law allows an appeal from such an order and, indeed, from any other order. But to exercise this right of appeal, the party appealing must comply with the rules. In custody

proceedings relating to children, it is no less important that the matter in dispute should be brought to an end as soon as possible. A child should be allowed to get on with his life with the parent to whom the court below has awarded custody. Uncertainty will not be in the interest of the child. A more liberal rule to extend time to enable a parent to file or serve a notice of appeal out of time against a custody order would not only undermine the timelines set by the ROC but would also be incompatible with the child's welfare as it would be unsettling. As far as possible, the court should ensure that there is stability in a child's life even in the situation of a broken home. Here, we should add that as regards the husband's appeal, his complaint, as far as the son is concerned, is a limited one, *ie*, that the access granted to the wife is too much.

23 It is trite law that when a judge exercises his discretion in a matter such as this, namely, the grant or refusal of an extension of time to file or serve a notice of appeal out of time, the appellate court should not substitute its own decision for that of the judge below unless it is shown that the judge had applied the wrong principle, or that he had taken into account matters which he ought not to have done, or failed to take into account matters which he ought to have done, or that the decision is plainly wrong: *The Vishva Apurva* [1992] 2 SLR 175.

24 In the light of what has been discussed above, we were satisfied that the judge below had erred on a matter of principle. Thus, we allowed the appeal of the husband and held that no extension of time should be granted to the wife to enable her to serve the notice of appeal out of time.