

DALAM MAHKAMAH TINGGI MALAYA DI IPOH

DALAM NEGERI PERAK DARUL RIDZUAN

[RAYUAN SIVIL NO: 11-21-2008]

ANTARA

YONG KON FATT

...

PERAYU

DAN

INDAH WATER KONSORTIUM SDN BHD

...

RESPONDEN

(No Syarikat: 211763-P)

CIVIL PROCEDURE: Appeal - Record of Appeal - Delay in filing - Application for extension of time filed after record of appeal filed - Whether sufficient reasons for court to exercise discretion to extend time - Rules of the High Court 1980, O. 1A, O. 2 r. 3

Held (application for extension of time to file Record of Appeal dismissed):

- (1) In the application pursuant to RHC O. 1A and O. 2 r. 3 relating to extension of time, the courts have been consistent in requiring that *prima facie* the requirements of the rules must be observed and any non-compliance must be shown to be due to genuine

inadvertence or oversight and be non-prejudicial to the respondent. In other words, the court would not excuse any non-compliance without any explanation or basis.

- (2) The filing of the record of appeal on behalf of the appellant on 30 May 2008 was not merely late but was also without leave or an order of the court to file beyond the stipulated time of 3 weeks. That record of appeal filed was therefore defective and irregular.
- (3) There was no explanation as to why upon filing the record of appeal on 30 May 2008, without any leave or an order for an extension of time from the court, this application for extension of time was not made simultaneously but much later on 21 August 2008. Between the dates 30 May 2008 and 21 August 2008 the appellant and his solicitor were fully aware that the record of appeal was filed out of time.
- (4) The blatant non-compliance of the procedural rules could not be accepted or excuse the appellant and should be explained satisfactorily by the appellant and his solicitors. The decision of the magistrate which the appellant wished to appeal against was made after a full hearing on its merits. It is incumbent therefore for the appellant to at least show the chances of his appeal succeeding if time for appealing is extended. In his

affidavit, the appellant did not allude to some facts or law so as to show at least an arguable case.

- (5) Upon the appellant's non-filing of the record of appeal within the prescribed time, the respondent was fully entitled to assume that the appellant was not proceeding with their appeal. Without any reasonable explanation by the appellant, it was clearly prejudicial to the respondent to be suddenly and unexpectedly faced with this application.

JUDGMENT

This is an application by the appellant for leave to file and serve the Record of Appeal out of time. The appellant is appealing against the decision of the Magistrate Court, Seri Manjung made on 17.4.2008 dismissing his application to amend the Statement of Defence. A Notice of Appeal was filed by his solicitors at the Magistrate Court, Seri Manjung on 22.4.2008. The appellant through his solicitors then filed the Record of Appeal on 30.5.2008. According to the appellant's affidavit-in-support there was a delay of 17 days. Under order 49, rule 6 of the Rules of the Subordinate Court 1980 the appellant was supposed to file the Record of Appeal on or before

13.5.2008, ie, within 3 weeks from filing the Notice of Appeal. The only explanation for the delay offered by the appellant in his affidavit-in-support was:-

“Notis Rayuan telah difailkan pada 22.4.2008 dan tarikh akhir untuk pemfailan Rekod Rayuan adalah sepatutnya pada 13.5.2008. Akan tetapi peguamcara saya telah memfailkan Rekod Rayuan pada 30.5.2008 di mana terdapat kelewatan 17 hari. Kelewatan ini berlaku kerana peguamcara saya telah terlepas pandang tempoh pemfailan Rekod Rayuan”.

The appellant solicitors did not file any submission in respect of this application but however submitted 3 authorities, *viz.* the Court of Appeal case of *Md Amin Md Yusof v. Cityvilla Sdn.Bhd.* [2004] 2 CLJ 57 and 2 High Court cases of *Sin Hai Estate Bhd. v. Lim Jit Kim @ Lim Tian Jee* [2003] 2 AMR 336 and *Azlan Shah Ahmad v. Kewangan Bersatu Bhd.* [2002] 5 CLJ 373. The respondent through their solicitors filed a written submission and relied on 3 authorities, *viz.* 3 Court of Appeal cases of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang* [1996] 2 CLJ 268, *Hock Seng Construction Sdn Bhd. v. Yong Kon Fatt* [2001] 3 CLJ 561 and *Raja Guppal Ramasamy v. Sagaran Pakiam* [1999] 2 CLJ 972.

The principles relating to an application for an extension of time to file Record of Appeal that are in favour of the appellant, in the circumstances of this, as contained in the 3 authorities submitted on his behalf can be briefly stated as follows: The appellant cannot be faulted by the negligence of his solicitors in not filing the Record of Appeal within the prescribed time (*Md Amin Md Yusof v. Cityvilla*

Sdn Bhd). Order 1A and Order 2 rule 3 of the Rules of the High Court 1980 allow the court to have regard to the justice of the particular case and to determine whether non-compliance of the rules has occasioned a Substantial miscarriage of justice. As such justice should overcome any technical impediment (*Sin Hai Estate Bhd. v. Lim Jit Kim @ Lim Tian Jee*). Lastly, since the respondent was served with a Notice of Appeal the respondent knew all along that the judgment of the Magistrate Court was being appealed. The respondent was therefore not prejudiced by the delay on the part of the appellant in filing his Record of Appeal (*Azlan Shah Ahmad v. Kewangan Bersatu Bhd.*).

In the application of Order 1A and Order 2 rule 3 of the Rules of The High Court 1980 relating extension of time the courts have been consistent in requiring that prima facie the requirements of the Rules must be observed and any non-compliance must be shown to be due to genuine inadvertence or oversight and non-prejudicial to the respondent. In other words, the court would not excuse any non-compliance without any explanation or basis. As for the rationale I can do no better than to refer to the observations of Hishamudin Yunus J in case of *Balakerisnan Varathan v. Muniandy Varathan* [2005] 4 AMR 760 where His Lordship stated:-

“ I must remark here that since the introduction of Order 1A and Order 2 r. 3 it has come to my observation that some litigants have the tendency to regard these provisions as a licence to ignore or to treat lightly rules of procedure. This being the case, it is imperative that the court treads cautiously before excusing any non-compliance by invoking these provisions; otherwise, these

provisions might be abused. In my view, the purpose behind the introduction of Order 1A and Order 2 r. 3 is not to protect the indolent or cavalier litigants, but to afford protection to the ordinary rule abiding litigants in a situation where the non-compliance is due to mere genuine inadvertence or oversight (and not blatant disregard) and non-prejudicial in nature; or where the non-compliance is not serious or fundamental in nature. The court has the solemn duty to ensure respect for the rules of procedure as enshrined in the Rules of the High Court”

The requirement for an applicant to put before the court some material upon which the court can exercise its discretion in an application to extend time was laid down by the Privy Council in *Thambo Ratnam v. Thamboo Cumarasamy & Anor* [1965] 1 WLR 8, an appeal from Malaya, where Lord Guest had this to say:-

“The rules of court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some steps in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a times table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodge and that his reason for this delay was that he hoped for a compromise. Their Lordships are: satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.”

The requirement to provide a satisfactory explanation to justify an extension of time is not only found in 3 authorities as submitted by the respondent but in fact also in the authorities submitted of behalf of the appellant. In the case of *Md Amin Md Yusof v. Cityvilla Sdn. Bhd.* the delay of 21 months was not without any satisfactory explanation. Similarly in the case of *Azlan Shah Ahmad v. Kewangan Bersatu Bhd.* there was a Satisfactory explanation for the 12 days delay in filing the Record of Appeal.

The 4 factors as laid down by Chan Sek Keong JC (as His Lordship then was) in *Han Khee Wee & Anor v. Chua Kian Tong & Anor* [1987] 2 MLJ 146 are normally applied by the courts in an application for an extension of time. They are:-

- (1) the length of the delay;
- (2) the reasons for the delay;
- (3) the chances of the appeal succeeding if time for appealing is extended, and
- (4) the degree of prejudice to the potential respondent if the application is granted.

It should however be noted that these factors are not intended to be rigid and mandatory requirement but merely a framework or guide enabling the court for exercise it discretion judicially. Also, it is not necessary that all these factors must be in favour of an applicant in orders for the court to exercise its discretion in favour of an application. These factors have been subsequently applied in numerous cases involving a similar application. Factors (2), (3) and (4) above were applied by the court in the authorities submitted on

behalf of the appellant, *Md Amin Md Yussof v. Cityvilla Sdn. Bhd.* and factor (2) and was applied in *Azlan Shah Ahmad v. Kewangan Bersatu Bhd.* respectively. Factors (2) and (4) were applied in the case of *Raja Guppal Ramasamy v. Sagarani Pakiam* and factor (2) was applied by the Court of Appeal in *Yeo Yoo Teik v. Jemaah Pangadilan Sewa, Pulau Pinang* and *Hock Seng Construction Sdn.Bhd. v. Yong Kon Fatt.*

I now turn to the circumstances of the appellant's application. It was not a correct statement to say that the appellant was only late in filing the Record of Appeal by only 17 days. The filing of the Record of Appeal on behalf of the appellant on 30.5.2008 was not merely late but was also without leave or an order of the court to file beyond the stipulated time of 3 weeks. That Record of Appeal filed was therefore defective and irregular (*Yogananthi a/p AS Thambaiya v. Idris b. Osman* [2006] 2 AMR 274). The appellant filed this application for an extension of time only on 21.8.2008 (enclosure 6). There was in fact a delay of 3 months and 8 days, ie, from 13.5.2008 to 21.8.2008. The explanation for the delay in filing the Record of Appeal as stated in the appellant's Affidavit on the face of it is therefore flimsy and inadequate. There was no explanation as to why upon filing the Record of Appeal on 30.5.2008, without any leave or an order for an extension of time from the court, this application was not made simultaneously but much later on 21.8.2008. Between the dates 30.5.2008 and 21.8.2008 the appellant and his solicitor were fully aware that the Record of Appeal was filed out of time. As stated earlier it was the appellant himself who filed the affidavit-in-support to

this application. In this case the applicant obviously took his own time to file this application for an extension of time despite knowing that he was out of time, at least from 30.5.2008 onwards. These matters involve factors (1) and (2) as stated above.

That blatant non-compliance of the procedural rules cannot be excepted or excuse the appellant and should be explained satisfactorily by the appellant and his solicitors. As stated in by the Court of Appeal in *Hock Seng construction Sdn.Bhd. v. Yong Kon Fatt* [2001] 3 AMR 2991: ‘..... It is our view that delay in filing *per se* is not fatal but a delay with complete lack of explanation as to why there was a delay is fatal’. In addition the appellant also failed to comply with factor (3) above as in his affidavit he did not allude to some facts or law so as to show at least an arguable case (*Raja Guppal Ramasamy v. Sagaran Pakiam*). The appellant’s application to amend his Statement of Defence at the court below was heard and dismissed on its merits with the learned Magistrate taking into consideration the Affidavits and written submissions filed by both parties respectively as stated in the draft order dated 17.4.2008 included in the appellant’s proposed Record of Appeal. It is incumbent therefore for the appellant to at least show the chances of his appeal succeeding if time for appealing is extended. That was one of the grounds considered by the Court of Appeal in the case of *Md Amiri Md Yusof v. Cityvilla Sdn.Bhd.*

On the appellant’s argument that the respondent was not prejudiced because he was served with the Notice of Appeal and

therefore aware that the decision of the Magistrate Court was being appealed, it should be made clear to the appellant that upon his non-filing of the Record of Appeal within the prescribed time the respondent was fully entitled to assume that the appellant was not proceeding with their appeal. Without any reasonable explanation by the appellant, it was clearly prejudicial to the respondent to be suddenly and unexpectedly faced with this application. In addition, as stated earlier, the decision of the Magistrate which the appellant wished to appeal was made after a full hearing on its merits. This matter involve factor (4) as stated above.

In conclusion, I have to say that the conduct of the solicitors for the appellant in this application was seriously wanting in diligence. They filed the Record of Appeal out of time on 30.5.2008 without leave or order for an extension of time and this fact was admitted by the appellant in his affidavit. From that date onwards therefore it cannot be accepted that they were not aware that they are out of time. If they were, it was not explained by the appellant's affidavit-in-support to this application. When the appellant's solicitors filed the Record of Appeal out of time at the High Court registry they even had the temerity in their covering letter (enclosure 4) to state: "Kami memohon agar dapat mahkamah menetapkan tarikh perbicaraan yang awal bagi kes di atas". The appellant too would have to be considered as having full knowledge of the circumstances of his non-compliance as he was the one who attested the affidavit-in-support to this application. On this matter the Court of Appeal in *Khor Cheng Wah v. Sungai Way Leasing Sdn.Bhd.* [1996] 1 MLJ 223, 229

reminded all litigants for the need to be diligent in pursuing their rights. His Lordship Gopal Sri Ram, JCA in delivering the judgment of the court stated:-

“It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The *maxim vigilantibus, non dormieitibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.”

In the circumstances of what has been said above, it is my considered opinion that there are no sufficient good grounds for me to consider to exercise my discretion to extend time. This application is therefore dismissed with costs.

Dated: 1 April 2009

(DATO' ZAINAL ADZAM BIN ABD GHANI)
Hakim Mahkamah Tinggi Ipoh
Perak Darul Ridzuan

For the appellant - Kelvin Ding; M/s Nga Hock Cheh & Co

For the respondent - Sharen Rosli; M/s Arifin & Partners

Case(s) referred to:

Azlan Shah Ahmad v. Kewangan Bersatu Bhd. [2002] 5 CLJ 373 (*refd*)

Balakerisnan Varathan v. Muniandy Varathan [2005] 4 AMR 760 (*refd*)

Khor Cheng Wah v. Sungai Way Leasing Sdn.Bhd. [1996] 1 MLJ 223 (*refd*)

Han Khee Wee & Anor v. Chua Kian Tong & Anor [1987] 2 MLJ 146 (*refd*)

Hock Seng Construction Sdn Bhd. v. Yong Kon Fatt [2001] 3 CLJ 561 (*refd*)

Md Amin Md Yusof v. Cityvilla Sdn.Bhd. [2004] 2 CLJ 57 (*refd*)

Raja Guppal Ramasamy v. Sagarani Pakiam [1999] 2 CLJ 972 (*refd*)

Ratnam v. Thamboo Cumarasamy & Anor [1965] 1 WLR 8 (*refd*)

Sin Hai Estate Bhd. v. Lim Jit Kim @ Lim Tian Jee [2003] 2 AMR 336 (*refd*)

Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang [1996] 2 CLJ 268 (*refd*)

Yogananthy a/p AS Thambaiya v. Idris b. Osman [2006] 2 AMR 274 (*refd*)

Legislation referred to:

Rules of the High Court 1980, O. 1A, O. 2 r. 3