

APK v APL
[2011] SGHC 66

Case Number : DT No 765 of 2008 (Summons No 687 of 2010)
Decision Date : 25 March 2011
Tribunal/Court : High Court
Coram : Kan Ting Chiu J
Counsel Name(s) : Peter Ezekiel (Peter Ezekiel & Co) for the applicant; Yeo Khee Chye Raymond (Raymond Yeo) for the respondent.
Parties : APK — APL

Civil Procedure

25 March 2011

Kan Ting Chiu J:

1 This is an application for the extension of time to file a Notice of Appeal against an order made in the course of divorce proceedings. The applicant is the husband/defendant ("the Defendant") in the divorce proceedings brought by the plaintiff/wife ("the Plaintiff"). Interim judgment has been entered, and orders on the ancillary matters, in particular the custody, care and control of the children of the marriage and the division of matrimonial property have been made, followed by the final judgment. The Defendant wished to appeal against the orders on the ancillary matters made on 12 August 2009 ("the ancillary orders"), and therefore made this application for an extension of time to file the Notice of Appeal. I dismissed the application, and the Defendant is appealing against my order.

Chronology of developments

- 2.1 19 February 2008 – The divorce proceedings were commenced.
- 2.2 15 August 2008 – Interim judgment was entered (the Defendant did not contest the writ.)
- 2.3 21 January 2009 – The Plaintiff's Affidavit of Assets and Means was served on the Defendant's solicitors in Malaysia, Chong & Poh. (The Defendant was informed that he was to file his Affidavit of Assets and Means.)
- 2.4 12 August 2009 – Justice Tan Lee Meng made orders on the ancillary matters ("the ancillary orders") in the absence of the Defendant who had also not filed his Affidavit of Assets and Means.
- 2.5 2 September 2009 – Final judgment was entered.
- 2.6 12 February 2010 – The Defendant applied for extension of time to appeal against the ancillary orders of 12 August 2009. The application included a second prayer which the Defendant did not pursue.

The ancillary matters

- 3 In the Plaintiff's Affidavit of Assets and Means she had stated that she was seeking: an order

on the custody, care and control of two of the children of the marriage, B and C and an order for the transfer of a property in Singapore registered in the joint names of the Plaintiff and the Defendant ("the Property") to her.

4 By a letter of 17 June 2008, Chong & Poh informed the Plaintiff's solicitors that:

- i) Our client is agreeable to the divorce;
- ii) Custody care and control of the two (2) children [B and C] to be given to the petitioner wife with reasonable visiting rights to our client;
- iii) All properties located either in Singapore or Malaysia is to be sold and the proceeds to be divided equally;

5 Subsequently, Chong & Poh ceased to act for the Defendant after they informed the Plaintiff's solicitors that they did not have the Defendant's instructions or *locus standi* to appear in court on his behalf on the hearing of the ancillary matters, and that they had informed him to attend in person.

[\[note: 1\]](#) The Defendant did not appoint other solicitors to act for him.

6 Consequent to Chong & Poh's response, the Plaintiff's solicitors corresponded with the Defendant at his address in Ipoh. After the ancillary orders were made, the Plaintiff's solicitors sent a copy of the orders to the Defendant on 25 August 2009.

The Order of Court of 12 August 2009

7 The ancillary orders were:

- (1) Custody care and control of the 2 minor children, namely, B and C to the Wife with reasonable access to the Husband;
- (2) [The Property] be transferred to the Wife free of any consideration;
- (3) The Wife gives up any right to any property in Malaysia now in the Husband's name or in the joint names of the Husband and the wife;
- (4) The Registrar of the High Court is empowered to sign the transfer documents on behalf of the Husband to effect the transfer of the abovementioned property to the Wife;
- (5) In view of the transfer of the Husband's share of the abovementioned apartment to the Wife, the Wife gives up her right to claim maintenance for herself;
- (6) The Wife's right to ask for maintenance for the children be reserved;
- (7) Costs of the Divorce proceedings to be paid by the Husband;
- (8) Liberty to apply.

(The Property was subsequently transferred to the Plaintiff's sole name on 23 October 2009.)

8 The Defendant eventually took action in the proceedings. On 11 November 2009 he wrote and informed the Registrar of the Supreme Court (the "Registrar") that he did not agree with the ancillary

orders. A reply from the Registrar dated 17 November 2009 was sent informing him *inter alia* that:

2. The contents of your letter is noted. If a litigant is not satisfied with the decision of the Court, the proper channel is to appeal against the judicial decision to the Court of appeal.
3. In the meantime, please seek legal advice from a practicing counsel on your legal recourse.

The application

9 This application for the extension of time to file a notice of appeal was filed on 12 February 2010 supported by an affidavit of the Defendant of the same date. In the affidavit, the Defendant deposed that:

- (a) upon being served the divorce papers on or about 6 May 2008, he engaged Chong & Poh to act on his behalf;
- (b) he informed his solicitors that he did not agree with the Plaintiff's proposals on the ancillary matters, especially the division of the matrimonial assets, and he wished to be heard on the matters;
- (c) his solicitors did not update him on the progress of the case because while they may have tried to keep him informed by mail, he was travelling, and did not open his mail box, and his solicitors did not contact him by telephone, and that lead to his not being represented at the hearing on the ancillary matters;
- (d) he became aware of the ancillary orders when he opened his mail box on 6 November 2009 and found the copy of the Order of Court of 12 August 2009 and

11. It was at this point that I sought the advise of friends who then advised me to engage a Singapore solicitor to try to set aside the Order obtained a [*sic*] apply for a fresh hearing date so that the [*sic*] I would have a chance to present my evidence and my side of the story. I could only engage a Singapore solicitor in late December 2009 as I did not have sufficient funds in November 2009 and some of the solicitors that I had earlier approached were reluctant to take on my case.

12. I then engaged a Singapore lawfirm, M/s Peter Ezekiel & Co sometime in mid December 2009, who then advised me that as the time for Appeal against the Order of Court has lapsed the [*sic*] I would be required to file Summons supported by an Affidavit to apply for leave to file my Notice Appeal out of time and therefore I am now doing so.

It is to be noted that:

- (a) he made no reference to his letter of 11 November 2009 and the Registrar's reply of 17 November 2009, and
- (b) he was inconsistent over the time he engaged his Singapore solicitor.

The application and the contended merits of the ancillary orders

10 The Defendant did not take issue with the validity of the ancillary orders. He did not dispute that the orders could be made in his absence and without any evidence from him. The grounds for the application were set out in his affidavit filed in support of the application.

11 With regard to the order on the custody, care and control of the children, the Defendant deposed:

14. I aver that my appeal to be allowed to have joint custody, with care and control to the Defendant with reasonable access of the two minor children of the marriage is not unreasonable and disruptive to lives of the said children.

(This was at odds with his solicitors' letter of 17 June 2008 (see [\[4\]](#) *supra*.) Order (1) of the ancillary orders reflected exactly what he had wanted.)

12 With regard to the order on the Property, he deposed:

I verily believe that the Learned Justice Tan made such an Order because I did not present my evidence and my version of facts so that he could make an informed decision ...

The delay

13 Under O 57 r 4(a) of the Rules of Court (Cap 322, R5, 2006 Rev Ed), the Defendant had one month from the date when the orders were pronounced or when he first had notice of the orders to appeal against them. That means that if he was aware of the orders when they were made, time will run from the date of the orders, but if he was not aware of the orders when they were made, time will run from the date when he had notice of them.

14 By his admission, the Defendant had notice of the ancillary orders on 6 November 2009. On that basis, he had up to 6 December 2009 to appeal, but he did not do that although he was informed by the Registrar that he should appeal if he was not satisfied with the orders.

15 He was also advised by his Singapore solicitor in December 2009 that the time for appealing had lapsed and he had to apply for leave to appeal out of time. It is reasonable to infer that the solicitor must have also warned him that he should proceed with his intended appeal without further delay. Nevertheless, he did not file his application till 12 February 2010, more than two months after the time for appealing.

The law

16 The principles which apply to applications for extension of time in appeals are well established. They have been set out in several cases, and it suffices to refer to the decision of the Court of Appeal in *AD v AE* [2004] 2 SLR(R) 505 which dealt with an application to serve a Notice of Appeal out of time. The Court held that such an application was to be dealt with on the same basis as an application to extend time to file a notice of appeal, and went on to state that it is settled law that in determining whether to grant an extension of time, four factors are to be considered:

- (a) the length of the delay;
- (b) the reason for the delay;
- (c) the chances of success of the appeal;
- (d) the prejudice to the potential respondent.

17 In that case, a delay of 49 days was held to be "(b)y any standard ... very substantial". The

Court also held that the delay in that case, which was caused by the inadvertence of solicitors, "could hardly be a sufficient reason" for obtaining an extension of time. On the third factor, the Court found that it could not be said that the appeal if allowed to proceed would be hopeless. On the last factor, the Court found that there would be no prejudice to the respondent if the application was granted. Against the background of those findings, the Court set aside an order which extended time for the service of the notice of appeal.

18 When the present application is examined, the following facts emerge:

- (a) the period of delay or more than two months is substantial;
- (b) the causes of the delay, *ie*, that he did not read his mail, that he did not maintain effective communication with his solicitors and that he did not have sufficient funds, were matters of his own making;
- (c) the chances of success of the intended appeal are low, because:
 - (i) the order on custody, care and control was identical to the arrangement that the Defendant had wanted;
 - (ii) as no evidence was put forward by the Defendant at the hearing on the division of the matrimonial assets, the facts that the Defendant set out in his affidavit in support of his present application are very unlikely to be admissible under the test laid down in *Ladd v Marshall* [1954] 1 WLR 1489 and applied in applications to admit new evidence in appeals to the Court of Appeal, *ie*, that the evidence could not have been obtained with reasonable diligence at the hearing; that the evidence must be such that if given, would probably have an important influence on the result of the case, though it need not be decisive; and that the evidence is apparently credible. The Defendant would have difficulties with the first requirement.
- (d) the Plaintiff would suffer some prejudice if the appeal is allowed to proceed because she had enforced the order on the transfer of the Property and had incurred costs and expenses to have the Property transferred to her name on 23 October 2009. While the prejudice can be redressed with the reimbursement of the costs and expenses, the Defendant has not given any assurance that he is able and ready to reimburse to the Plaintiff those costs and expenses.

19 Upon reviewing the application against the evidence and the legal requirements that the Defendant had to satisfy, I found that he had not put up a sufficient case for time to be extended for him to file a notice of appeal against the ancillary orders.

[\[note: 1\]](#) Chong & Poh's letters dated 19 February 2009, 7 April 2009 and 21 May 2009