

YAM -v- GOH

In the High of Solomon Islands

(Muria ACJ)

Civil Appeal Case No. 4 of 1992

Hearing: 1 October 1992

Judgment: 19 October 1992

A. H. Nori for the Appellant

J.C. Corrin for the Respondent

MURIA ACJ: The Appellant was on 31 January 1992 granted an extension of time to apply for leave. He was further granted 7 days within which to file his application for leave if he had not yet done so. The application for leave, having been filed, was heard on 19 March 1992 and leave to appeal was granted on 30 March 1992. I dealt with those two applications as well as the present application in the exercise of my powers under section 19 of the Court of Appeal Act, 1978 sitting as a single judge of the Court of Appeal.

By virtue of Rule 10(1) and (3) of the Court of Appeal Rules, 1983 the time allowed for filing a notice of appeal after leave to appeal has been granted is 30 days from the date when the applicant is informed of the grant which in this case was 30 March 1992. It must therefore be obvious that at the latest, the Notice of Appeal should be filed by the 30 April 1992.

It was contended by Mr Nori that when the application for leave was filed on 4 November 1991 the Notice of Appeal was also lodged at the same time. He submitted that when leave to appeal was granted the Notice of Appeal having been already lodged in Court should be treated as having been duly filed. Mr Nori further stated that despite the Notice of Appeal having been already lodged, no copy of the document has been returned by the Court to him, so that he could attend to service on the Respondent. Counsel further stated that he sought a copy of the Notice of Appeal from the Court during the months of March and April but none was given to him until 6 June 1992. Thus counsel submitted that the Notice of Appeal was duly filed and should be allowed to be served out of time.

Ms Corrin objected to the application and submitted that the Notice of Appeal was invalid and therefore ineffective as being filed out of time. Even if it was in time, she submitted, the Notice of Appeal had not been served within 7 days as required by the rules. Because of these, she refused to accept service of the Notice of Appeal.

In order to ascertain properly the sequence of events leading to this application in this case, it is necessary to look at what took place since the Default Judgement was given on 9 August 1991.

Upon learning that a Default Judgement had been entered against him on 9 August 1991, the Defendant attempted on a number of occasions, with no success, to ascertain from his then solicitor Mr David Campbell as to the situation surrounding the Default Judgement. The Defendant then directly approached Mr Nori who was to have acted as counsel and sought his assistance.

On 21 August 1991 Mr Nori filed an application by Summons to set aside the Interlocutory Judgement in Default. A filing fee of \$25.00 was paid - GTR No. 086186. The application was heard on 29 August 1991 and was dismissed by the Registrar of High Court.

On 12 September 1991, following the unsuccessful application to set aside the Judgement in Default, the Defendant again tried to see his solicitor, Mr Campbell but with no success. Mr Nori had then left for New Zealand. The Defendant then tried to lodge some documents in Court himself attempting once again to apply to set aside the Interlocutory Judgement in Default with the alternative of appealing against the Registrar's decision of 29 August 1991 dismissing the application to set aside the Default Judgement. The Defendant paid the fee of \$25.00 - GTR 086242 for the application. The Defendant's documents were not accepted by the Registrar as they were not in the proper form. It was obvious that the Defendant was not happy with the Default Judgement as well as the Registrar's decision dismissing the application on 29 August 1991 and he was determined to pursue the matter further.

On 2 October 1991 Mr Nori lodged an application for leave to appeal against the Interlocutory Judgement in Default of the 9 August 1991. Mr Nori also at the same time put in a Notice of Appeal against the Default Judgement of 9 August 1991. A cheque for \$50.00 was also lodged with the application.

On 4 October 1991 the Registrar wrote to Mr Nori informing him that the application for leave was out of time and that he would need an order extending the time to file the application for leave. The application for leave should have been filed by 23 August 1991 to comply with the Court of Appeal Rules.

Mr Nori then filed a Summons which was dated 4 November 1991 on 7 November 1991 applying for extension of time. That application was heard on 30 January 1992 and extension of time was granted on 31 January 1992. Following the grant of the extension of time, the application for leave to appeal was fixed for hearing on 19 March 1992. In the meantime, under cover of a letter of 12 March 1992, the cheque for \$50.00 issued by Mr Nori in October 1991 was returned to him by the Registrar as being out of date and requested Mr Nori to make a fresh payment of the court fee for the application.

Following the Registrar's request, Mr Nori paid by cheque \$25.00 - GTR 173833, on 19 March 1992. The application for leave to appeal was also heard on the same day (19 March 1992).

Leave to appeal was granted on 30 March 1992. By virtue of Rule 10(3) of the Court of Appeal Rules the Notice of Appeal must be filed within 30 days from the date leave to appeal is granted. Paragraph (3) is provided as follows:-

"(3) where an application for leave to appeal is granted the time for filing the notice of appeal for the purposes of paragraph (1) shall start from the date when the applicant is informed of the grant."

Paragraph (1) provides that every notice of appeal shall be filed within 30 days of the decisions complained of. Thus in this case, the notice of appeal should have been filed, at the latest, by 30 April 1992, to comply with the Rules.

Mr Nori submitted that the Notice of Appeal lodged on 4 November 1991 with the application for leave was effective. Hence, Counsel added, after leave was granted on 30 March 1992, the Notice of Appeal was already sitting in Court and that all that should have been done was for the Registry to stamp it and return copies for service upon the Respondent. This, counsel said the Court Registry failed to do until 26 May 1992 and resulted in the papers not being served on the Respondent until 9 June 1992.

The issue here is a short one. Simply, whether the Appellant had filed a valid Notice of Appeal or not. The Court will decide this question in the light of the factual events as outlined earlier in this judgement.

For a Notice of Appeal to be effective, it must comply with the Rules. Rule 7 of the Court of Appeal Rules provides that the conditions precedent to appeal in civil cases are those set out in Rules 8, 10, 11 and 12. Rule 8 says that an appeal must be by "*notice of appeal*". Rule 10 as we have seen, provides for the time within which an appeal must be filed. Rule 11 provides that special conditions may be imposed on an

appeal and Rule 12 provides for the payment of a fee "*upon filing*" of a notice of appeal and also for payment of security for costs after filing a Notice of Appeal.

I think it is also worth noting Rule 13 which provides that in the event of non-compliance with the conditions precedent all proceedings in the appeal shall be stayed unless the Court otherwise order and the appeal shall be listed for formal dismissal at the next sessions of the Court. What is more, section 15 of the Court of Appeal Act, 1978 provides that the Court shall not entertain any appeal under the Act unless the appellant has fulfilled all the conditions of appeal prescribed by the rules of court.

For our present purpose, I think the Court need only concern itself with Rules 10 and 12 in the light of the facts as canvassed earlier.

When, can it be said, was the Notice of Appeal in this case filed? Mr Nori argued that upon leave being granted on 30 March 1992, the Notice of Appeal which was already lodged with the Court, became effectively filed with the Court.

I accept that on 19 March 1992 I saw the Notice of Appeal in the Court file when I heard the application for leave. I noticed that one of the grounds of appeal was that the Appellant has had no notice of the Order of the High Court requiring him to file an affidavit of documents within 7 days. The Court was there dealing with an application for leave to appeal. The Notice of Appeal could not then be said to have been filed because leave had not yet been granted until 30 March 1992. Thus although the Notice of Appeal was lodged at the same time as the application for leave was filed, it was ineffective as no leave had yet been granted.

When leave was granted on 30 March 1992, what is the effect of the Notice of Appeal which was already lodged in Court before then? The essence of the Appellant's argument is that the Notice of Appeal must be regarded as "*duly filed*" as from 30 March 1992 and all that the Registry Clerk had to do was to stamp it and issued copies for service. I do not think it is proper for the Registry of the Court to assume that all documents placed with the Court are "*duly filed*" and so must be accepted. To do so would be to encourage non-compliance with the Rules, not only by legal practitioners but also by the Court. Having been granted leave, Mr Nori should have taken appropriate steps to have the Notice of Appeal "*filed*", that is, to deliver the Notice of Appeal to the Registrar to be filed, in compliance with the Rules. This must be done as the Notice of Appeal purportedly filed before leave was granted was ineffective. As it turns out, no Notice of Appeal has been filed within 30 days of the grant of leave in this case. The stamping of the Notice of Appeal on 26 May 1992 was of no effect. In any case, the Notice of Appeal was stamped as "*File, 26 May 1992, 3.45 pm,*" which was almost two months after leave was granted.

But even if I accept that the Notice of Appeal had been delivered in time for filing by reason of the fact that it ought to be taken as being lodged with the Court on 30 March 1992, the Appellant must still satisfy the Court that it was "**filed**" in compliance with Rule 12. This is essential for the Notice of Appeal to be "**duly filed**".

Rule 12 requires an appellant to pay "**forthwith**" upon the filing of any notice of appeal the prescribed fee. Failure to do so would result in the powers under Rule 13 being exercised by the Court in staying all proceedings and listing the appeal for formal dismissal.

In this case, Mr Nori stated that all appropriate fees had been paid. Having checked the records of payment made since the Default Judgement was made on 9 August 1991, the only payments made were those already mentioned earlier in this judgment. Having returned the cheque for \$50.00 on 12 March 1992 the only fee paid by the Defendant/Appellant was the \$25.00 (GTR 173833) for the application for leave paid on 19 March 1992. No fee was ever paid after that in respect of the Notice of Appeal.

The combined effect of Rules 10 and 12, (and the other Rules mentioned above for that matter), is that for an appeal to be duly filed it must not only be lodged in time but also the prescribed fee must be paid forthwith **upon filing**.

A somewhat similar point had been decided in this court in *Patatoa -v- Talauai* (1983) SILR 112. That case was concerned with an appeal to the Customary Land Appeal Court. The time limit for appealing was three months from the date of the decision of the Local Court. There was a failure to pay the prescribed fee on appeal. It was held that the Local Courts (Fees in Civil Cases) Rules required payment "**on appeal**" of a fee and as the fee was not paid within the three months period, the appeal was not duly brought. At page 115, Daly CJ, stated:-

"First, if the appeal notice is filed and no fee is paid within the three month period, could the Clerk to the CLAC have an answer if proceedings were brought against him to require him to process the appeal for hearing? In my judgement, the answer to that question would be 'yes'. The Clerk would be entitled to say that the Rules require a fee to be paid 'on appeal' and, until that fee is paid, there is no matter for the Court to consider. There is, in other words, no duly brought appeal that is before the Court and therefore, to employ the expression used in Seselono's case (Seselono -v- Kikiolo (1982) SILR 15) at p. 17, nothing that is 'lawfully justiciable'."

I feel the principle expressed by Daly CJ applies here. There had been no appeal fee paid **upon filing** of the Notice of Appeal in this case, even if I accept that the Notice of Appeal had been lodged at the time leave to appeal was granted on 30 March 1992,

within the time allowed for filing of the Notice of Appeal. On that basis also there is no appeal duly brought in this case.

Other matters were also raised by Counsel in the course of their argument. However, I do not feel it is necessary to dwell on those matters as they no longer matter in view of the conclusion I have now reached.

The Notice of Appeal purportedly filed and stamped on 26 May 1992 is out of time and the order sought for the said Notice of Appeal to be served out of time is refused.

Costs of this application to be paid by the Appellant to the Respondent to be taxed if not agreed.

(G.J.B. Muria)
ACTING CHIEF JUSTICE