

ALBERT WONG -v- YVONNE BAIATA DENNIS

HIGH COURT OF SOLOMON ISLANDS  
(KABUI, J.).

Appeal Case No. 1 of 2000

Date of Hearing: 12<sup>th</sup> September 2002

Date of Ruling: 12<sup>th</sup> September 2002

*Mrs A.N. Tongarutu for the Applicant*

*Mrs M.B. Samuel for the Respondent*

**RULING**

**Kabui, J.** This is an application by an Amended Summons for the following orders-

1. Enlargement of time to allow application to set aside filed on 7<sup>th</sup> February 2002.
2. The Registrar's order dated 16<sup>th</sup> October 2000 be set aside.
3. Any other orders the Court deems fit to make. This application was filed by the Applicant on 11<sup>th</sup> September 2002.

**The Background**

The background to this application was set out in my judgment of 5<sup>th</sup> June 2001. Briefly, the Magistrate Court in Honiara made a decision against the Appellant on 2<sup>nd</sup> December 1999. The appellant appealed on 11<sup>th</sup> February 2000 by filing a notice of appeal against that decision. The matter came before the Registrar on 6<sup>th</sup> October 2000 for directions. The Registrar ordered that the appellant pay the fee of \$1780.00 within 7 days in default of which the appeal would be struck out. The appellant paid the sum of \$1780.00 on 13<sup>th</sup> October 2000 well after the "**unless order**" had lapsed. The appellant had not been aware of the fact that his appeal had been struck out by the lapse of 7 days as ordered by the Registrar's order of 6<sup>th</sup> October 2000. The appellant now seeks to set aside that order that curtailed his appeal. The appellant however has applied for extension of time to enable him to apply for an order to set aside the order made by the Registrar.

**Extension of time regarding an "unless order" of the Court.**

The rule is that where the time limit imposed by an "**unless order**" expires without the party in whose favour the order was made prosecuting the action within that time limit, there can be no extension of time for the action is at an end. See **Whistler v. Hancock** (1887-78) 3 Q. B. D. 83 at 84, and **King v. Davenport** (1878-79) 4 Q. B. D. 402). It is said that the Court has no jurisdiction to extend time for the action no longer exists to give the Court jurisdiction. The only remedy lies in an appeal against the decision. The time to appeal can however be extended. (See page 16 of The Supreme

Court Practice 1973, Volume 1.). The cases of **Whistler v. Hancock and King v. Davenport** cited above were however distinguished in **Carter v. Stubbs** (1880-81) 6 Q. B. D. 116 and also in **Collinson v. Jeffery** [1896] 1 Ch. 644. The cases of **Whistler v. Hancock and Carter v. Stubbs** cited above were also referred to in **Manley Estates, Ltd. v. Benedek** [1941] 1 A. E. R. 248. In Whistler's case, the decision was based on the fact that the statement of claim constituting the action had not been filed within the time limit. No action was therefore in existence. The same happened in the King's case. The other cases cited above were concerned with **"unless orders"** made on procedural points of practice that had nothing to do with the existence of the action. The Court therefore had discretion to decide one way or the other depending on the circumstances of each case. There is no hard and fast rule that the Court applies in all cases.

### **This Case.**

There is no dispute in this case that the **"unless order"** made by the Registrar was dated 6<sup>th</sup> October 2000. The former Solicitor for the appellant was present in Court when that order was made. The 7 days time limit lapsed on 12<sup>th</sup> October 2000. The appellant did not know about the order and the fact that his appeal had been struck out. The appellant was late in paying the fee by one day. It was just unfortunate for him to be one day late. The appellant however left the matter too late to come to Court. The application for extension of time was filed only yesterday. There was a delay of some 23 months. Whilst it is true that the appellant's present Solicitor took over the case only in February 2001, the delay is still unreasonable. There is no evidence to explain the delay in this case. It is pertinent to note that as far back as 20<sup>th</sup> February 2001, the former Solicitor had informed the present Solicitor that since the appellant's file had been destroyed by fire, the Court papers might have to be obtained from the Magistrate or the High Court. The present Solicitor for the appellant was aware that the appellant's appeal had been struck out by 5<sup>th</sup> April 2001. This would reduce the delay on the part of the present Solicitor to some 17 months. This still is not a good excuse. However, the fact is that the appellant had paid the fees on 13<sup>th</sup> October 2000 some 8 months later. The time limit for the payment of appeal fee is 7 days as prescribed by Order 60, rule 5 of the High Court Rules. This error, if I may call it that, has not been opposed by the other side so as to invalidate the appeal in terms of Order 69 of the High Court Rules. There is an appeal on foot. To deny the appellant the opportunity to prosecute his appeal would be to cause him injustice. I will extend time to enable the appellant to apply to set aside the order made by the Registrar as aforesaid. Since both applications were made at the same time, I will decide them together. That is, having granted extension of time, I will also order that the order made by the Registrar on 6<sup>th</sup> October 2000 be also set aside. Cost will be cost in the appeal. I order accordingly.

**F. O. Kabui**  
Judge