Kilang Kelapa Sawit Sri Lingga Sdn Bhd & Anor v A Girish Kumar a/l Gopalakrishnan & Ors [2011] MLJU 736

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

AZIAH BINTI ALI J

PERMOHONAN SEMAKAN KEHAKIMAN NO R1-25-524-2010

25 May 2011

David Gurupatham *(****David Gurupatham*** *& Koay) for the applicant*
Natra Idris (Attorney General's Chambers) for the attorney general
D Nair (Nik Saghir & Ismail) for the first respondent

AZIAH BINTI ALI J

JUDGMENT

[1]By Award No:1371/2010 dated 27.10.2010 the Industrial Court found that the 1st Respondent, on a balance of probability, has discharged the onus of proving that he was constructively dismissed on 30.7.2002. The Industrial Court awarded backwages and compensation to the 1st Respondent.

[2]On 17.12.2010 the Applicant filed the application for leave for judicial review under Order 53 of the Rules of the High Court 1980 for an order of certiorari to quash the said Award (enclosure 1). On 10.1.2011 the application was served on the Attorney General and on the solicitors for the 1st Respondent.

[3]On 21.1.2011 the 1st Respondent filed his affidavit in reply (enclosure 7) and avers amongst others that according to the letter from the Industrial Court dated 17.1.2011 the solicitors for the Applicants received the Award on 29.10.2010 (exh.GK-1). The application for judicial review ought to have been made within 40 days from the date "when grounds for the application first arose or when the decision is first communicated to the applicant". The 1st Respondent avers that the application enclosure 1 does not contain a prayer seeking extension of time to file the application for judicial review or reasons for the delay in filing the application. Therefore the application ought to be dismissed for non-compliance with Order 53 r.3(6) of the RHC.

[4]On 25.1.2011 the Applicant filed summons-in-chambers (enclosure 5) seeking the following orders -

(i) Bahawa Pihak Pemohon memohon kebenaran di bawah Perkara 8 Jadual kepada Akta Mahkamah Kehakiman 1964 untuk memfailkan Permohonan Bagi Semakan Kehakiman diluar tempoh masa 40 hari yang diperuntukkan di bawah Aturan 53 Kaedah 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980;

(ii) Jika kebenaran di perenggan (1) di atas diberi maka permohonan Bagi Semakan Kehakiman yang telah difailkan dilanjutkan masa sehingga 17/1/2010 dan diterima sebagai sah;

(iii) bahawa kos permohonan ini adalah kos dalam kausa; dan

(iv) Iain-Iain Perintah yang difikirkan perlu dan sesuai oleh Mahkamah Terhormat ini.

Grounds for application

[5]The grounds relied on by the Applicant as found in their application are as follows -

(i) Berdasarkan Aturan 53 Kaedah 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 Pemohon perlu memfailkan Permohonan Bagi Semakan Kehakiman dalam masa 40 hari dari tarikh pemfailan ia itu pada atau sebelum 8/12/2010.

(ii) Kami hanya mengetahui mengenai award No.1371/2010 bertarikh 27/10/2010 apabila kami menerima surat daripada Peguam Responden Pertama iaitu Tetuan Nik Saghir & Ismail bertarikh 10/11/2010.

(iii) Kami hanya mengetahui mengenai serahan Award tersebut ke pejabat kami pada 29/10/2010, apabila kami menerima Affidavit Jawapan Responden Pertama pada 21/01/2011.

(iv) Kami membuat semakan akan fail kami dan tidak menjumpai surat atau Award tersebut daripada Pihak Mahkamah Perusahaan, kami akhirnya berjumpa surat tersebut di dalam fail yang lain.

(v) Saya sesungguhnya memohon maaf kerana kelewatan memfailkan Permohonan Bagi Semakan Kehakiman. lanya adalah tidak disengajakan.

(vi) Saya sesunnguhnya percaya bahawa permohonan ini adalah bona fide dan kelewatan ini adalah tidak disengajakan. Saya juga percaya bahawa permohonan ini tidak akan memprejudiskan pihak Responden oleh kerana Pihak Responden boleh secara adil dan saksama dibayar gantirugi dengan kos.

(vii) Saya selanjutnya dengan rendah diri ingin memohon maaf dan menghujahkan bahawa tidak terdapat kurang hormat terhadap Mahkamah ini bahawa terdapat kelewatan untuk memfailkan Permohonan Bagi Semakan Kehakiman.

Both the Attorney General and the 1st Respondent opposed the application. Having considered the submissions I dismissed the application. Consequently the application for leave was also dismissed. Costs of RM2,000.00 each was awarded to the Attorney General and the 1st Respondent.

[6]Essentially the explanation offered by counsel for the Applicants is that it was an honest mistake on his part as he was not aware that the Award had been served on his firm until 10.11.2010 i.e. when he received the letter from the 1st Respondent's solicitors (exh.SK-2). It is submitted that the court ought not to penalize an innocent client due to the mistake of his solicitor. Counsel submits that the delay of nine days is not too long or contumelious. It is further submitted that there is no real prejudice to the 1st Respondent and the 1st Respondent can be compensated with costs. Counsel urged the court to exercise its discretion in favour of the Applicants. For the 1st Respondent counsel submits that the Applicant's solicitors did receive the Award on 29.10.2010 but misplaced it. It is submitted that mistake by a solicitor is not a valid or cogent reason and is not acceptable. In support counsel refers to my decision in the case of *Eden Child Care Development Centre Sdn Bhd v Rita Davanderi Stevenson & Anor* [2010] 1 LNS 1206 wherein I dismissed an application for abridgment of time to file the Form 111B under Order 53 r.4 of the RHC. In that case the explanation offered by counsel for the applicant was that the failure to file the Form 111B within time specified under Order 53 r.4 was due to oversight by his staff. I found the explanation unreasonable. In the judgment in that case I had referred to the Court of Appeal case of *Gurdev Kaur Bhag Singh v BSN Commercial Bank (M) Bhd* [2003] 1 CLJ 429 wherein the Court of Appeal said -

> In any event we did consider the grounds advanced in support of the two applications and we found no merit in them. In the first motion the explanation given for the delay in filing the proper notice of appeal against the order for sale is squarely put to the former solicitor of the applicant in that it was alleged that he did not do his work and did not keep the applicant informed of the status of the case. That is not a good reason for us to exercise our discretion and grant leave. The applicant can always seek remedy elsewhere if she has any grievance against her former solicitor. It is settled law that mistake of one's solicitor is not necessarily a good excuse. (See:*Sinnathamby & Anor v. Lee Chooi Ying* [1987] 1 CLJ 157; [1987] CLJ (Rep) 336; *Brijkishore & Anor v. Lee Chooi Ying [1987] 1 MLJ110*).
>
> As for the delay in the second motion we are also of the view that the reason given is unsatisfactory. Her solicitor should have been more acquainted with the procedural aspect of applying for an adjournment instead of merely writing a letter to the court. Due diligence should have been shown to enquire on the status of the application instead of waiting for a few months to make a search. Such mistake or omission is not ipso facto a reason for us to exercise our discretion in favour of the applicant.

Counsel for the 1st Respondent further submits that the mistake by the Applicant's solicitors has caused severe prejudice to the 1st Respondent who has waited for six years for justice.

[7]For the Attorney General learned Senior Federal Counsel submits that in the context of Order 53 r.3(6) an honest mistake is not a justifiable or reasonable reason. Learned Senior Federal Counsel relies on the case of *Abdul*

Rahman Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 CLJ 805.

Decision

[8]Order 53 r.3(6) reads as follows -

> An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

In the case of *Abdul Rahman Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* (supra), Abdull Hamid Embong JCA (as His Lordship then was) said as follows -

> 0. 53 r. 3(6) RHC requires prompt action to be taken in an application for judicial review. The application has to be made within 40 days from when the decision is communicated to the applicant.
>
> Order 53 RHC confers jurisdiction on the High Court to entertain an application for judicial review seeking any of the prerogative writs mentioned in para. 1 of the Schedule to the Courts of Judicature Act 1964.
>
> That jurisdiction may however only be exercised upon obligatory compliance with the imperative requirement of time set under 0. 53 r. 3 RHC.
>
> Thus, compliance with the time frame is fundamental. It goes to the starting point, that of jurisdiction to hear the application.

Effect must be given to the intention of Order 53 r.3(6) and a prompt move to apply for a judicial review is therefore necessary. It is imperative that an application for judicial review is made within time (per Jeffrey Tan JCA in *Menteri Besar Negeri Pahang Darul Makmur v Seruan Gemilang Makmur SdnBhd* [2010] 5 CLJ 123).

[9]An application for abridgment or extension of time is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case. The onus is on the Applicant to satisfy the court that there are good grounds why discretion ought to be favourably exercised. It is trite law that the Court has an unfettered discretion to grant or refuse an extension of time. The first principle is that the rules of Court must prima facie be obeyed and in order to justify an extension of time, there must be some material on which the Court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules on limitation of period (per Hashim Yeop Sani J (as he then was) in*Ong Guan Teck & Ors v Hijjas Kasturi* [1982] CLJ 616 (Rep); [1982] CLJ 31). The mere fact that the 1st Respondent may be compensated in money is not conclusive of the question whether the application for abridgement of time should or should not be allowed.

[10]The Applicant's solicitors ought to be acquainted with the procedural aspect of applying for leave for judicial review particularly the mandatory requirement as to time provided under Order 53 r.3(6) of the RHC and to act diligently and expeditiously within the time frame prescribed by the said provision. I find that there is an apparent lack of due diligence on the part of the Applicant's solicitors. The explanation by counsel for the Applicants that the delay was because he was not aware that the Award had been served on his firm is not a satisfactory or acceptable reason for this court to exercise its discretion and grant extension of time.

[11]Further I note that the application for extension of time was made only after the 1st Respondent had filed his affidavit in reply resisting the application for judicial review. In his affidavit amongst the grounds the 1st Respondent had raised in support of his contention that the application for judicial review ought to be dismissed is the failure by the Applicants to file the application within 40 days and the absence of any prayer for extension of time. I find that the application for extension of time made by the Applicants after notice of the grounds of objection had been given to them vide the 1st Respondent's affidavit is a manoeuvre intended to overcome the 1st Respondent's valid objection to the application.

[12]The power of the court to entertain the application for judicial review is predicated on jurisdiction and jurisdiction is conferred only upon the grant of leave. In the case of *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271, Raja Azlan Shah Ag LP (as His Royal Highness then was) said -

When this Court grants leave, it has jurisdiction to hear the substantive motion itself.

The grant of leave is subject to compliance with the time frame set out under Order 53 r.3(6). In the absence of leave, the substantive motion for judicial review is not properly before the court. I am constrained to note that the Applicant herein made this application for extension of time vide summons in chambers. In my opinion this court has no jurisdiction to entertain this application since the substantive motion is not properly before the court as leave has yet to be granted. In the circumstances I am of the view that the application made by way of summons in chambers is procedurally irregular.

[13]For the reasons stated above the application enclosure 5 is dismissed. The application for leave is accordingly dismissed. Costs of RM2,000.00 each is awarded to the Attorney General and the 1st Respondent.

End of Document