Y.K.S Enterprise Sdn Bhd v Aspirasi Ternama Sdn Bhd [2019] MLJU 1170

Malayan Law Journal Unreported

HIGH COURT (JOHOR BAHRU)

AHMAD KAMAL BIN MD. SHAHID, J

GUAMAN SIVIL NO. : JA-12ANCVC-29-10/2018

10 October 2019

Kuthubul Zaman (Anis Syarizad Zaman with him) (Syarizad Zaman & Seah) for the plaintiff.
*Christopher Yeo (Angie Tan with him) (**David Gurupatham** & Koay) for the defendant.*

Ahmad Kamal bin Md. Shahid J:

JUDGMENTINTRODUCTION

[1]This is an appeal by the Appellant / Plaintiff against the decision of the Learned Sessions Court Judge Tuan Mohammad Haldar Abdul Aziz dated 16.10.2018 in allowing the Respondent's / Defendant's application for an extension of time to file their Notice of Appeal against the decision made by Learned Sessions Court Judge Puan Elisabet Paya Wan on 21.12.2017.

[2]The instant appeal was heard wherein I had allowed the appeal with RM3,000.00 costs subject to payment of the allocator fee. I append below my grounds for doing so. I will refer the parties as they were described in the Sessions Court.

BRIEF FACTS GEMAINE TO THE APPEAL

[3]The facts are elucidated from the various affidavits, the judgment of the Learned Sessions Court Judge (**SCJ**) and the written submissions of the respective parties. The salient facts as alluded to by the respective parties in their written submissions are adopted herein with and / or without modifications.

[4]On 24.11.2016 the Plaintiff had filed a claim for damages against the Defendant pursuant to late delivery of vacant possession of a 1 ½ Storey Terrace Corporate Factory at the Sessions Court (Civil Suit No.: JA-A52NCvC-216-11/2016) claiming damages amounting to RM270,510.96 with interest and costs.

[5]On or at about the same time, Lenhong Marketing Sdn. Bhd., had also filed a similar suit against the Defendant (Civil Suit No. : JA-A52NCvC-217-11/2016) claiming damages amounting to RM270,510.96 with interest and costs.

[6]Although the Plaintiff in this case, YKS Enterprise Sdn. Bhd and Lenhong Marketing Sdn. Bhd are different companies, they have the same directors. Both the Plaintiff and Lenhong Marketing Sdn. Bhd had entered into separate Sale & Purchase Agreements with the Defendant on 18.01.2012 wherein they purchased separate units of 1 ½ Storey Terrace Corporate Factory at the same price, which is RM1,180,000.00. As such, the dates of the Sale & Purchase Agreement were the same, and the purchase price was the same and the damages claimed were also the same.

[7]During the trial, as both civil suits involved the same witnesses, and have similar facts and issues, the Learned SCJ had directed that both cases be heard together. However, the Learned SCJ did not consolidated the two civil suits, and as such informed parties that she will be giving two separate decisions with regards to both civil suits.

[8]On 20.12.2017, the Learned SCJ delivered two separate judgments for both civil suits and awarded cost separately for both suits.

[9]At the conclusion of the trial, the claim against the Defendant were allowed. The Defendant discharged Messrs. Han & Partner and appointed Messrs. ***David Gurupatham*** & Koay (**Solicitors for the Defendant**) as the new solicitors to appeal against the decision of the Sessions Court.

[10]However, solicitors for the Defendant has mistakenly filed one (1) Notice of Appeal for both the matters instead of two (2).

[11]The solicitors for the Defendant then filed the Notice of Application dated 5.7.2018 pursuant to Order 3 Rule 5 of the *Rules of Court 2012* (**ROC 2012**) seeking extension of time to file in the Notice of Appeal.

[12]On 16.10.2018, the Learned SCJ allowed the Defendant's application for extension of time.

THE PLAINTIFF'S CONTENTION

[13]There were two (2) separate civil suits, with two (2) separate decisions, wherein the Learned SCJ clearly awarded costs separately for both suits and therefore two (2) separate Notices of Appeal should be filed for both suits.

[14]Solicitors for the Defendant had acted negligently in filing only one (1) Notice of Appeal. The one Notice of Appeal is also defective for both cases as it wrongly combines both civil suits.

[15]On 30.1.2018, the solicitors for the Plaintiff received a phone call from the solicitors for the Defendant wherein the solicitors for the Defendant made an unequivocable admission to the solicitors for the Plaintiff that the Defendant had taken notice of the fact that they have made a mistake in filing only one (1) Notice of Appeal and two (2) separate Notices of Appeal should have been filed as the matter was not consolidated.

[16]The solicitors for the Defendant despite having knowledge that they had wrongly filed only one (1) Notice of Appeal have failed to make an application for extension of time so that new separate Notice of Appeal can be filed for both cases.

[17]The Defendant only filed a Notice of Application on 5.7.2018 before the Learned SCJ asking for an extension of time for a new Notice of Appeal to be filed. As such, there is an inordinate delay of 184 days (approximately six (6) months) between the date of the Notice of Appeal should have been filed i.e. 3.1.2018 and the date the Notice of Application for extension of time was filed i.e. 5.7.2018.

[18]The Plaintiff submits that the Learned SCJ had erred in law and in fact in allowing the Defendant's application for extension of time for the following reasons :-

a) The Learned SCJ has failed to make any finding / determination with regards to the preliminary objection (**PO**) raised by the Plaintiff that the Affidavit in Support that was served on the Plaintiff does not contain any :

   (i) Exhibits annexed to the affidavit;

   (ii) Certificate before whom the affidavit was sworn that the exhibits were identified.

b) The Learned SCJ erred when he decided that the actions of the Defendant amounted to technical non-compliance and allowed the application based on "prinsip keadilan".

c) The Learned SCJ erred when he disregarded settled and established case law that a solicitor mistake is not a good reason for the court to exercise its discretion and granting leave.

d) The Learned SCJ had erred when he decided that special circumstances existed in this case when in fact such circumstances does not exist.

e) The Learned SCJ had erred when he stated that a delay of six (6) months plus is not an inordinate delay.

f) Order 55 Rule 2 of the *ROC 2012* is mandatory in nature, as it employs the words “SHALL”. The failure to file a proper Notice of Appeal that is compliant with the ROC 2012 is serious in nature and should not be taken lightly.

THE DEFENDANT’S CONTENTION

[19]The Learned SCJ had rightly exercised his discretion in accordance with the judicial principle for extension of time and therefore there is no ground for this court to intervene the finding of the Learned SCJ.

[20]The solicitors for the Defendant had admitted that they had mistakenly filed one (1) Notice of Appeal (**the irregular Notice of Appeal**) for both matters instead of two (2).

[21]The Defendant submits that the irregular Notice of Appeal was due to confusion that there were two (2) separate civil suits but heard together in the same Sessions Court.

[22]The Defendant submits the delay in filing the Notice of Application for extension of time was contributed by a series of unforeseeable and undesirable events, in which the Defendant had tried to clarify and / or to rectify if possible at all material time.

[23]Therefore, it is clear and obvious that the delay in filing of the Notice of Appeal is not unexplained and / or inordinate. Thus, the Learned SCJ was justified in granting the application.

[24]Further, the Defendant contended that the delay was not intended and / or inordinate, coupled with the fact that the Defendant had done almost everything possible and / or reasonable to try mitigating any potential prejudice towards the Plaintiff.

[25]The Defendant submits that taken into consideration the chronology of event that clearly disclosed a series of unenforceable events, which would fall within the ambient of the ‘special circumstances’.

[26]The Defendant further submitted that this is an appeal with merits and ought not be failed due to ‘trivial’ technical non-compliance on the part of the Defendant especially when the non-compliance was not intentional.

THE LAW

[27]Order 55 Rule 2 of the *ROC 2012* states that :

> **Appeal to be by re-hearing on notice (**O.55, r.2**)**
>
> 2. All appeals to the High Court shall be by way of re-hearing and shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from.

[28]However, the court has been vested with broad and guided discretion in any application for an extension of time. This is stated in Order 3 Rule 5 of the ROC 2012 :

> **Extension of time (**O.3, r.5)
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> 5.(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these Rules or by any judgment, order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
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> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.

[29]The court has also been entrusted with inherent power to make any order as may be necessary to ensure that litigant would not be prejudiced and / or deprived of justice as provided in *Order 92 Rule 4* of the *ROC 2012* :-

> **Inherent powers of the Court (**O.92, r.4)
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> 4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[30]In the case of **Badrisahrunah Binti Nawang & Satu lagi Lawan Darjah Singh A/L Mukhtar Singh & Satu Lagi [2008] 5 MLJ 893**, V.T. Singham J (as he then was) held that :-

> (1) The leave for an extension of time to file a notice of appeal out of time is subjected to the discretion of the court. Such discretion ought and should be exercised judicially and not be lightly assumed by any court. **To enable the court to exercise its discretion judicially, supporting affidavit should and must contain sufficient evidence or facts (material) before the court and the grounds for the delay. The duty to show evidence or facts (materials) or grounds and reasons for the delay is the responsibility of the party applying for leave (see para 4).**
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> [Emphasis added]

[31]In the case of *Abdul Hamid Mohd Amin V. Ramacon Corporation Sdn Bhd* [2016] 3 CLJ 111, Gunalan Muniandy, J.C (Now J) decided that :

(1) Non-compliance of a mandatory provision of the ROC which is fundamental in nature will no longer be regarded as technical non-compliance of a rule that may be remedied under O. 1A of the RHC. **Where there are blatant breaches of rules and procedure that are mandatory and fundamental in nature, the applicant needs to show strong and cogent grounds that are considered sufficient in order to invoke the court's discretionary power to grant extension of time**. (paras 6 & 7)

(2) **The word 'shall' in procedural rules is mandatory provision that cannot be casually disregarded but must be strictly complied with and adhered to, save under exceptional circumstances**. The appellant had admittedly failed to file his AR within the expressly stipulated 30 days deadline but had only done so 41 days after filing and service pf the notice of appeal. He had thus breached the mandatory provisions of O. 55 r.4(1) of the ROC. (paras 12 & 13)

(3) **Although the delay was mere 11 days, the grounds advances by the appellant for the delay were far from strong and cogent for the court to justifiably exercise its discretion in favour of an extension**. The ground, that the delay was due to an oversight of the time limit of 30 days to file the AR while awaiting for the notes of evidence and grounds of judgment to be supplied by the trial court, lacked credibility in view of the fact that the appellant was then represented by solicitors. The lack of bona fide on the part of the appellant was manifestly clear from his filing of application for extension of time only after the respondent had filed its striking out application. Further, the appellant's allegation that the failure of the respondent's solicitors to respond to the draft index had contributed to the delay in the filing of the AR, was shown to be patently baseless and misconceived. When the appellant's solicitors sent the draft index to the respondent's solicitors, the appellant was already out of time to file the AR. (paras 13, 14, 15 & 18)

(4) **Although the court is vested with wide discretionary powers in deciding whether an application for extension of time should be granted, the discretionary powers must be exercised judicially in accordance with the established principles and by taking into account all relevant consideration**. **In this case, there was blatant disregard for and disobedience of the relevant rules for which there was no sufficient material to justify the exercise of the court's discretion to cure the non-compliance.** (paras 16 & 18)

[Emphasis added]

[32]In this case, the High Court also referred to the Federal Court decision in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar AlHaj V. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 and the High Court said at page 114 :-

> [6] **It is now settled law that non-compliance of a mandatory provision of the ROC which is fundamental in nature will not be regarded as technical non-compliance of a rule that may be remedied under O. 1A of the RHC**. This issue was dealt with by the Federal Court in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Ah-Haj v. Datuk Captain Hamzah Mohd Noor & Another Appeal* [2009] 4 CLJ 329 where Tun Zaki Azmi, CJ held :
>
> [46] The technical non-compliance of any rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as O. 1A RHC is for the court or judge to give heed to justice over technical non-compliance. **It must not supersede a mandatory requirement of the Rules.** O. 1A RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. Thus in this case, O.1A RHC does not apply as the respondents had intentionally disregarded *O. 6 r. 7(2A)* RHB for their own reasons.
>
> [Emphasis added]

[33]Further, the Court of Appeal in *Gurdev Kaur Bhag Singh V. BSN Commercial Bank (M) Berhad* [2003] 1 CLJ 429 held that :-

> 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 to 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 MLJ 110*).
>
> 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.** [Emphasis added]

[34]I am mindful of the limited role of the appellate court in relation to findings of fact made by the court of first instance. The principles of appellate intervention has been discussed in many cases. In **Vasudevan VT. Damodaran & Anor [1981] 2 MLJ 150 at 151** the Federal Court held that :-

> **(b) Review of discretion by an appellate court**
>
> There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that the judge has rightly exercised his discretion and the appellate court must not reserve the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for difference of opinion (Charles Osenton & Co. V. Johnston at page 148 per Lord Wright). The Privy Council held in Ratnam V. Cumarasamy & Anor that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to Evans V. Bartlam.

[35]The Court of Appeal in *Kek Siong Uteh V. Aw Siew Keon* *[2016] 4 MLJ 356* **at 368** held that :-

> [51] This is an appeal that is largely fact-sensitive and therefore turns primarily on the findings of fact made by the learned trial judge. In this context, the law is trite that it is the trial judge who is best positioned, by reason, inter alia, of the audio

> visual advantage he enjoys, to assess, balance and evaluate the evidence adduced at trial. Accordingly, his findings of fact are accorded considerable respect and weight by an appellate court. **Such findings of fact are not lightly disturbed unless the appellant is able to show clear errors on the part of the judge in evaluating the evidence before him. This may be established, for example, by a failure to consider relevant evidence, undue weight erroneously accorded to certain segments of the evidence and none to rebuttal evidence, a failure to make findings of fact and other instances of judicial misappreciation of the evidence as a whole. The list is not exhaustive and it is not possible to specify or encompass the various computations that could give rise to an error warranting appellate intervention under the head of judicial misappreciation of the evidence.** [Emphasis added]

[36]Further in *Gan Yook Chin & Anor V. Lee Ing Chin & Ors* [2004] 4 CLJ 309 **at 320** the Federal Court stated as follows :-

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention i.e., to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and / or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase "insufficient judicial appreciation of evidence" merely related to such a process. **This is reflected in the Court of Appeal's restatement that a judge who was requires to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.** [Emphasis added]

DECISION OF THE COURT

[37]After scrutinizing the appeal records, the written submissions and the decision of the Learned SCJ, the court was satisfied that the Learned SCJ had made an error of law in the finding of facts and evidence in coming to his decision.

[38]Order 55 Rule 2 is mandatory in nature, as it employs the word "SHALL". The failure to file a proper Notice of Appeal that is compliant with the ROC 2012 is serious in nature and should not be taken lightly.

[39]In this case, I find that there were two separate civil suits, with two separate decisions, wherein the Learned SCJ clearly awarded cost separately for both suits, and therefore two separate Notices of Appeal should be filed for both suits.

[40]However, when the Solicitors for the Defendant took over the matter, they negligently, without any cogent cause or reason, only filed one notice of appeal for both matter wherein the Notice of Appeal is defective as it combines both civil suits.

[41]In the Affidavit in Support, the Defendant attempts to provide an excuse that at the time the Notice of Appeal had been filed, the Defendant only had the Written Submission for the Sessions Court trial in their possession and as such drew an assumption that the 2 matters had been consolidated. However, upon careful perusal of the Rekod Rayuan at page 114 the said Written Submission clearly states 'YANG DI DENGAR BERSAMA'.

[42]As such, the Solicitors for the Defendant had acted negligently in filing only one Notice of Appeal. Further, I find the Notice of Appeal is also defective for both cases as it wrongly combines both civil suits.

[43]As shown in the affidavits, the assumption that the matter had been consolidated was one the Solicitors for the Defendant arrive at on their own accord, due to their own negligence and failure to ascertain all facts clearly before filing the Notice of Appeal. Even based on the documentation that the Defendant admitted to be in their possession at the time of filing the Notice of Appeal, it is obvious that the matters had only been heard together.

[44]Further, chronology of events below clearly shows Defendant's blatant disregard of the rules. I find that as clearly as 30.1.2018, the Defendant's had taken notice of the fact that two (2) separate Notices of Appeal should have been filed and that they had committed a grave error in only filing one Notice of Appeal.

[45]This is because on 30.1.2018, the Solicitors for the Plaintiff received a phone call from the Solicitors for the Defendant wherein the Solicitors for the Defendant made an unequivocal admission to the Solicitors for the Plaintiff that :-

(a) The Solicitors for the Defendant have notice that they made a mistake in filing only one Notice of Appeal.

(b) The Solicitors for the Defendant should have filed two separate Notices of Appeal as the matter was not consolidated.

(c) The Solicitors for the Defendant are now deciding whether they would like to file an application for an extension of time so that separate Notices of Appeal for both matters can be filed.

[46]Unfortunately, despite having made an admission that they had wrongly filed one notice of appeal, the Solicitors for the Defendant negligently failed to make the said application. The Solicitors for the Defendant clearly acknowledged that they committed a grave error, blatantly refused to quickly file an application for extension of time so that their error could be corrected. Instead, they negligently allowed time to pass, prejudicing their own client despite knowing they had been negligent.

[47]On 1.2.2018, the Solicitors for the Plaintiff received two letters from the Solicitors for the Defendant wherein they appended the draft index for the Record of Appeal.

[48]As such, on 2.2.2018, the Solicitors for the Plaintiff replied to both letters and had clearly stated :-

> "Kindly be advised that we are of the view that your single Notice of Appeal filed in respect of the 2 civil actions is wrong as there was never a consolidation order in respect of the 2 cases."

[49]Therefore, it can be clearly said that from 30.1.2018, the Defendant had full knowledge of the fact that their appeals were not in order.

[50]However, despite receiving clear notice from the Solicitors for the Plaintiff that the single Notice of Appeal filed was not in order and defective, the Solicitors for the Defendant blatantly refused to file an application for extension of time so that new separate Notices of Appeal can be filed for both cases.

[51]In gist, I noticed the Defendant's had ample opportunities to quickly file an application for extension of time :-

(a) On 30.1.2018 when they clearly admitted to having committed the grave error, and informed the Plaintiff's Solicitors that they were considering filing the application.

(b) On 2.2.2018 when they received the letter from the Plaintiff's Solicitors clearly stating that the Notice of Appeal was not in order.

(c) On 9.2.2018, wherein the Plaintiff's Solicitors repeated the contents of their letter dated 2.2.2018 to the High Court stating that the Notice of Appeal filed by the Defendant was not in order.

(d) On 27.2.2018 when the Senior Assistant Registrar (**SAR**) confirmed that there had only been one appeal filed (the one in the case involving Y.K.S Enterprise Sdn Bhd) and as such, the appeal involving Lenhong Marketing Sdn Bhd will be closed.

(e) On 6.3.2018 immediately after the 2nd case management when the SAR confirmed that the fact that the case number remains open does not mean that the appeal is in order, and that the Plaintiff can still raise a preliminary objection against the Notice of Appeal.

(f) On 15.3.2018, when the Defendant filed an Application for Extension of time for the case of Lenhong Marketing Sdn Bhd, the Defendant had negligently filed one defective Notice of Appeal for both cases (i.e. Lenhong Marketing Sdn Bhd and YKS Enterprise Sdn Bhd). As such, if the Notice of Appeal is defective for one case, then it is clear that the Notice of Appeal must be defective for the other case as well. The only prudent action when filing a notice of application for one case, is to also file it for the other case as both cases stemmed from the same defective Notice of Appeal.

[52]The above shows the Defendant had in fact ignored the ROC 2012 on purpose. It was not from the lack of being informed. I find that the Defendant was informed multiple times, by multiple parties including the SAR himself and yet still remained indignant in their negligent ways and failed to take swift action to correct their errors.

[53]Because of Defendant's own behavior I am of the considered view that the delay of 184 days in filing the notice of appeal is inordinate and extensive especially when no cogent reasons were put forward to explain such delay and especially when the Defendant had full knowledge of the defective Notice of Appeal on 30.1.2018 itself.

[54]The Defendant had relied on the decision of *Md. Amin Bin Md. Yusof dan Satu Lagi V. Cityvilla Sdn Bhd* *[2004] 4 MLJ 441* **at 445** to support its contention that the delay of 184 days is not inordinate delay.

[55]I find the case of **Md. Amin Bin Md. Yusof (supra)** can easily be distinguished as in that case the failure to file the appeal records was only noticed 21 months after the date that it was due. As such, the Court had allowed the application.

[56]However in the instant case, the Defendant had taken notice and acknowledged and admitted that the Notice of Appeal was defective from 30.1.2018 itself, as such, the delay from 30.1.2018 to 5.7.2018 cannot be explained. Further, the Defendant had filed an application for extension of time for the case of Lenhong Marketing Sdn Bhd on 15.3.2018, the Defendant should have filed the same application for this case on the said date to avoid any further delay. As such, I find all reasons provided by the Defendant were unjustifiable.

[57]The Defendant further refers to the case of *Kejora Aman Sdn Bhd V. HMS Corporation Sdn Bhd* [2016] AMEJ 0909 whereby one (1) irregular and / or defective notice of appeal was filed for three (3) decisions.

[58]The case of **Kejora Aman Sdn Bhd (supra)** can easily be distinguished as in that case, the 3 interlocutory decisions were in relation to the same case number. Further, in that Notice of Appeal filed by the Appellant in the **Kejora Aman** case, the Appellant had specified which and what decision is being appealed against. There is no ambiguity and the Respondent is not misled. In the instant case, the defective Notice of Appeal filed negligently combines two separate case numbers, and failed to specify which and what decision is being appealed against.

[59]Further, I also find the Defendant had not done everything possible to try and mitigate any potential prejudice to the Plaintiff. The Defendant should have filed an application for extension of time immediately on 30.1.2018, instead they dragged out the time without any cogent reason and only filed the application on 5.7.2018.

[60]I find that this is not the case where the mistake stems from the registry as being alluded to by the Defendant in their submission. The mistake, to me stems from themselves. Further, this is not a case of sudden death or inevitable accident or sudden serious illness or something of that kind which reasonably accounts for the delay. As such, this case has to be distinguished from the case of *Cheah Teong Tat V. Ho Gee Seng & Ors* *[1974] 1 MLJ 31* as submitted by the Solicitors for the Defendant.

[61]The Defendant also submitted that the SAR of the Sessions Court had written to both solicitors informing of e-filing system has mistakenly processed the irregular Notice of Appeal which led to two (2) appeal numbers being issued.

[62]On this issue, I agree with the submission of the solicitors for the Plaintiff. To me the e-filing system issuing two case numbers is not in actual fact an issue that this Court needs to consider. At the very crux of it, the issue lies with the defective Notice of Appeal. As such, the moment the Defendant's Solicitors are aware and acknowledged the defective Notice of Appeal, an application for extension of time needs to be filed. Further, I find the Defendant is negligent in its belief that the appeal for this case was in order. The defective Notice of Appeal remains defective for both cases.

[63]After scrutinizing the chronological event in this case, I find the circumstances involved in this case are not extraordinary or unforeseeable. There are no special circumstances existed in this case.

[64]Lastly on the issue of PO. After perusing the cause papers and the issue raised in the PO, I find that the Learned SCJ erred in not ruling the PO in favour of the Plaintiff.

[65]During the hearing before the Learned SCJ, the Plaintiff had raised a PO against the Defendant's application as the Affidavit in Support served on the Plaintiff via fax and courier was not completed and as such defective. This is

because the Affidavit in Support that was served on the Plaintiff (see pages 25 to 34 of the Rekod Rayuan) does not contain any :

(a) Exhibits annexed to the affidavit;

(b) Certificate before whom the Affidavit was sworn that the exhibits were identified.

[66]Learned SCJ had erred in his judgment as he had completely failed to consider and also to make any findings as to the said PO.

[67]The said PO stems from Order 41 Rule 11 of the *ROC 2012* which states as follows :-

> "11(1) Any document to be used in conjunction with an affidavit shall be exhibited and a copy thereof annexed to the affidavit.
>
> 11(2) Any exhibit to an affidavit shall be identified by a certificate of the person before whom the affidavit is sworn. The certificate shall be entitled in the same manner as the affidavit and rule 1(1), (2) and (3) shall apply accordingly."

[68]In the Affidavit in Reply filed by the Plaintiff, the Plaintiff had raised that the Affidavit in Support served on the Plaintiff was incomplete and as such defective under the ROC 2012. Only upon receiving the said Affidavit in Reply from the Plaintiff did the Defendant notice the error.

[69]As such, the Defendant attempted to serve on the Plaintiff the entire Affidavit along with the exhibits on 28.7.2018. However, I am of the view that this does not remedy the said defect. This is because pursuant to Order 32, Rule 13(2)(a) of the *ROC 2012*, it clearly states that :-

> "Save as otherwise provided in these Rules, or unless otherwise directed by the Court -
>
> a. An affidavit intended to be used in support of an application shall be filed and served on the other party within fourteen days from the date of filing of the application"

[70]In this case, I find that the Notice of Application had been filed on 5.7.2018, and as such pursuant to Order 32, Rule 13(2)(a) of the *ROC 2012*, the Affidavit in Support shall be filed and served on the other party within fourteen days from the date of filing of the application. As such, any attempt to serve the Affidavit in Support with the exhibits to the Appellant outside the fourteen days is not in compliance with Order 32 Rule 13(2)(a) of the *ROC 2012*.

[71]Therefore, the Learned SCJ had clearly erred when he had failed to make any findings and / or determination in regards to the PO that was raised by the Plaintiff which became an issue in the said Application. I also find that the Learned SCJ had also erred when he failed to allow the said PO.

CONCLUSION

[72]Having given this matter careful consideration, I am of the view, that for the reasons I have highlighted above, this is a case in which the Learned SCJ erred in principle. Therefore, this appeal falls within the category of cases in which appellate interference is justified.

[73]In conclusion, I am of the considered view that the Learned SCJ had clearly erred when allowing the application for an extension of time made by the Defendant.

[74]I hereby allowed the Plaintiff's appeal with cost of RM3,000.00 subject to payment of the allocator fees.