

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 502 of 2021

BETWEEN

**EDMOND TIABO (as Executor of
the Estate of Kathleen Tiabo)**

CLAIMANT/RESPONDENT

AND

ENGLEBERT TIABO

DEFENDANT/APPLICANT

Before the Honourable Madam Justice Geneviève Chabot

Date of Hearing: March 23rd, 2023

Appearances

Anthony Sylvester, for the Claimant/Respondent

Nazira Uc Myles, for the Defendant/Applicant

**RULING ON APPLICATION TO EXTEND TIME TO SERVE NOTICE OF APPEAL
OR FOR SUBSTITUTED SERVICE AND ON APPLICATION FOR STAY OF
EXECUTION**

1. Englebert Tiabo (the “Applicant”) seeks to appeal a Judgment of this Court dated December 5th, 2022 (the “Judgment”), in which I found in favour of the Claimant (the “Respondent” in this Application). Owing to circumstances described below, the Applicant was unable to serve the Notice of Appeal on the Respondent within the 7 day requisite period.
2. The Applicant filed two Applications which I deal with together in this Ruling. The Applicant applies for an extension of time to serve the Notice of Appeal, or alternatively for an order for substituted service. The Applicant also applies for a stay of execution of the Judgment pending the appeal.

3. The Application for an extension of time to serve the Notice of Appeal or for substituted service is denied. Under the *Senior Courts Act, 2022* and the newly amended *Court of Appeal Rules*, the High Court does not have the jurisdiction to make any order in relation to the service of a Notice of Appeal.
4. The Application for the stay of execution of the Judgment is granted. The appeal raises questions of law and facts which are not frivolous or fanciful, and there is a risk that the appeal be rendered nugatory should the properties at issue be disposed of, or their value be affected in any way by the conduct of the Respondent.

Background

5. The Applicant filed the Notice of Appeal on December 20th, 2022. Pursuant to subsection 4(2) of Order II of the *Court of Appeal Rules*, the Applicant had 7 days to serve the Notice of Appeal on the Respondent.
6. According to the Amended Affidavit of Englebert Tiabo dated February 23rd, 2023, efforts were made to locate the Respondent in Belize. In addition to the two properties which are the subject of this appeal, the Applicant identified two other addresses where the Respondent could potentially be located: one in Belize City, and one in Belmopan.
7. On December 20th, 2022, the Applicant engaged the services of a process server to execute service of the Notice of Appeal on the Respondent in Belize City. The Respondent could not be located at any of the Belize City properties on either December 20th or December 21st, 2022. The process server visited the properties one last time on December 23rd, 2022. Unable to find the Respondent, the process server left the Notice of Appeal at one of the properties he visited, being the Respondent's brother Glenford Tiabo's house in Belize City.
8. The Applicant also sought to serve the Notice of Appeal on the Respondent at the Belmopan address by requesting the assistance of the Police Department. Officers visited the Belmopan property on December 21st and on December 23rd, 2022, but could not locate the Respondent. A copy of the Notice of Appeal was left with the Respondent's brother Glenford Tiabo in Belmopan.
9. In addition to taking these steps, the process server also left a copy of the Notice of Appeal at the law office of the Respondent's counsel at trial, Richard Bradley, on December 22nd, 2022.
10. On January 4th, 2023, the Respondent was personally served with the Notice of Appeal. The Applicant seeks an extension of time to January 4th, 2023 to serve the Respondent.

Analysis

Application to extend time to serve the Notice of Appeal or for substituted service

11. Since the Notice of Appeal was filed on December 20th, 2022, the newly enacted *Senior Courts Act* applies to these Applications. The *Senior Courts Act* replaces both the *Supreme Court of Judicature Act*¹ and the *Court of Appeal Act*,² which previously governed each of these bodies. The issue arising in this Application is whether under the *Senior Courts Act*, the High Court has jurisdiction to extend the time for the service of a Notice of Appeal, or to grant leave for substituted service.
12. The *Senior Courts Act*, as it applies to leave applications, was very recently interpreted by Farnese J. in *Best Buy Limited v Dwight Flowers*.³ The issue in *Best Buy* was whether the High Court has jurisdiction to grant leave to appeal a decision of the High Court to the Court of Appeal. Farnese J. ruled that the *Senior Courts Act* removes this jurisdiction from the High Court, except in matters of *habeas corpus*.
13. In her decision, Farnese J. noted that section 199(1) of the *Senior Courts Act*, which empowers the Court of Appeal to hear and determine civil appeals, extends those powers to “all purposes of and incidental to” the hearing and determination of civil appeals. Section 199(1) reads as follows:

199(1) Subject to this Part and to rules of court, the Court shall have jurisdiction to hear and determine appeals from judgments and orders of the High Court given or made in civil proceedings and for all purposes of and incidental to the hearing and determination of any such appeal.
14. According to Farnese J., the language in section 199(1) is clear and unambiguous, and includes the power to grant leave where leave is required.
15. In coming to her conclusion that the *Senior Courts Act* removes the High Court’s jurisdiction to grant leave to appeal except in defined circumstances, Farnese J. compared the *Senior Courts Act* with the former *Court of Appeal Act*. She noted that while the language in section 199(1) of the *Senior Courts Act* is virtually identical to the language in section 13(1) of the *Court of Appeal Act*, the interpretation of section 13(1) was coloured by its context. According to Farnese J.:

[3] Subsection 199(1) uses the identical language to subsection 13(1) of the *Court of Appeal Act (CA Act)* save for changing “Supreme Court” to “High Court.”

¹ Cap. 91 of the Substantive Laws of Belize.

² Cap. 90 of the Substantive Laws of Belize.

³ Claim No. 480 of 2020 (“*Best Buy*”).

Under the *CA Act*, subsection 13(1) was not interpreted as precluding the Supreme Court from deciding on leave applications. That interpretation was undoubtedly informed by multiple provisions that followed subsection 13(1) which explicitly referenced leave to the Supreme Court or the judge who made the decision under appeal. For example, subsections 14(2)(b) and 14(3)(b) of the *CA Act* allowed appeals in otherwise prohibited matters “in any other case, except with leave of the Supreme Court, or if it refuses, of the Court.” The equivalent provisions in the *SCA* now read “in any other case, except with the leave of a single judge of the Court, or, if that judge refuses, with leave of the Court”. Court in this part of the *SCA* is defined as the Court of Appeal.

[4] In contrast, subsection 201(6) of the *SCA* expressly contemplates the High Court retaining jurisdiction to hear leave to appeal applications for *habeas corpus* matters:

(6) Notwithstanding, sub-section (4)(a), an appeal shall lie to the Court from the decision of the High Court, with the leave of that court or of the Court of Appeal, against any decision of the High Court granting or refusing a writ of *habeas corpus*. (emphasis added)

All other references to the Supreme Court considering leave to appeal applications of its own decisions in civil matters were removed when the equivalent provisions were incorporated into the *SCA*. I find that must have been a deliberate choice by the Legislature to limit the circumstances when the High Court will decide the question of leave of its own decisions.

16. It is with that decision in mind that I now turn to the question at issue in this Application. While this Application does not pertain to a leave application, I note that service of a Notice of Appeal is also a matter incidental to, or is made for the purpose of the hearing and determination of a civil appeal. Issues surrounding the service of a Notice of Appeal are included among the powers given to the Court of Appeal under section 199(1) of the *Senior Courts Act*.
17. Neither the *Court of Appeal Act*, nor the *Senior Courts Act* address the service of a Notice of Appeal on the responding party. Service is addressed in the *Court of Appeal Rules*, which have migrated from the *Court of Appeal Act* to the *Senior Courts Act* with some amendments. I find that under the newly amended *Court of Appeal Rules*, the High Court does not have the jurisdiction to extend the time for the service of a Notice of Appeal, or to make an order for substituted service. Issues surrounding the service of a Notice of Appeal are within the exclusive jurisdiction of the Court of Appeal.

18. The Applicant argues that under the *Court of Appeal Act*, neither the Court of Appeal nor the (then) Supreme Court had the power to extend the time for service of a Notice of Appeal. Failure to serve a Notice of Appeal within 7 days of its filing would inevitably result in the dismissal of the appeal. That position is well supported by the case law.⁴
19. The Applicant rightly observes that under the newly enacted *Senior Courts Act*, an appellant can now apply for an extension of time to serve a Notice of Appeal. The Applicant argues that this Court is vested with the authority to hear and determine such an application under sections 16 and 17 of the *Court of Appeal Rules*. These sections read as follows:

16.-(1) In any cause or matter pending before the Court a single judge of the Court may upon application make orders for—

- (a) giving security for costs to be occasioned by any appeals;
- (b) leave to appeal in *forma pauperis*;
- (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
- (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
- (e) extension of time,

and may hear, determine and make orders on any other interlocutory application.

(2) Every order made by a single judge of the Court in pursuance of this rule may be discharged or varied by any judges of that Court having power to hear and determine the appeal.

17.-(1) Applications referred to in rule 16 shall ordinarily be made to a judge of the Court, but, where this may cause undue inconvenience or delay, a judge of the Court below may exercise the powers of a single judge of the Court under that rule.

(2) The Registrar of the Court below shall send to the Registrar one copy of any application made to a judge of the Court below and of the order made thereon.

⁴ *Sharryn Dawson v Central Bank of Belize*, Civil Appeal No. 18 of 2015 (“*Dawson*”); *Carl Raney v Wayne Raney et al.*, Civil Appeal No. 17 of 2018 (“*Raney*”); *Michael Slusser v Sandra Bergqist and anor*, Civil Appeal No. 3 of 2015 (“*Slusser*”).

20. According to the Applicant, subsection 16(1)(e), read together with subsection 17(1) of the *Court of Appeal Rules*, empower this Court, as the Court below, to extend the time for the service of a Notice of Appeal.
21. I disagree. The amended *Court of Appeal Rules* clearly demonstrate the Legislature's intent to confer on the Court of Appeal exclusive jurisdiction to extend the time for service of a Notice of Appeal. Section 4 of Order II of the *Court of Appeal Rules* was amended to allow for an appellant to apply for an extension of time to serve a Notice of Appeal. Subsection 4(2) states that a Notice of Appeal shall be served upon the respondent within 7 days of its filing. The proviso in subsection 4(2) clearly and unambiguously provides that the power to extend or abridge any time appointed by the *Senior Courts Act* or the *Court of Appeal Rules* for the service of a Notice of Appeal vests with the "Court", which is defined in section 2(1) of Order I of the *Court of Appeal Rules* as the Court of Appeal:

(2) A true copy of the notice shall be served upon the respondent within seven days after the original notice has been filed,

Provided that the Court may enlarge or abridge time appointed by the Act or these Rules as the justice of the case may require and any such enlargement or abridgement may be ordered even after the expiration of any time limit imposed hereunder upon such terms as the Court shall deem just.

22. The proviso in subsection 4(2) is a new addition to the *Court of Appeal Rules*. The previous iteration of subsection 4(2) of the *Court of Appeal Rules* did not address the issue of extension of time. By adding the proviso in subsection 4(2) to the *Court of Appeal Rules*, the Legislature clearly signals its intention to confer on the Court of Appeal exclusive jurisdiction to deal with issues related to the timing of service of a Notice of Appeal. Had the Legislature intended for the High Court to have concurrent jurisdiction over the extension of time to serve a Notice of Appeal, it would have clearly stated so in the proviso.
23. On the other hand, sections 16 and 17 of Order II of the *Court of Appeal Rules* migrated from the *Court of Appeal Act* to the *Senior Courts Act* unamended. Sections 16 and 17 of the *Court of Appeal Rules* were already included in the *Court of Appeal Act* at the time the decisions in *Dawson*, *Raney* and *Slusser* were rendered. The Court of Appeal did not consider these sections as conferring on the courts the power to extend the time for service of a Notice of Appeal.
24. Sections 16 and 17 of Order II continue to confer on the High Court the power to rule on applications for "extension of time" where it may cause undue inconvenience or delay to apply to a judge of the Court of Appeal. However, paragraph 16(1)(e) speaks generally of "extension of time" while subsection 4(2) addresses specifically the extension of time to serve a Notice of Appeal. It is a principle of construction of statute that a specific provision

overrides a general provision. As explained by the authors of *Bennion, Bailey and Norbury on Statutory Interpretation*:

Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision.

The principle was articulated by Sir John Romily MR in *Pretty v Solly*:

"The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

This principle is sometimes expressed in the maxim *generalibus specialia derogant* (special provisions override general ones), or the converse, *generalia specialibus non derogant* (general provisions do not override special ones). The principle, as Lord Cooke of Thorndon said in *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK*:

"... is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage."⁵

25. Because of its specificity, subsection 4(2) of Order II overrides sections 16 and 17 and applies to this Application. The Court of Appeal is the only Court vested with the jurisdiction to extend the time to serve a Notice of Appeal.
26. Other provisions of the *Court of Appeal Rules* support a finding that the Legislature intended for the Court of Appeal to have exclusive jurisdiction to deal with *any* matter in relation to the service of a Notice of Appeal. Under subsection 4(1) of Order II, the Court of Appeal is the only Court with the jurisdiction to order that a party be served with a Notice of Appeal. Similarly, under subsection 8(2) of Order I, it is the Court of Appeal who has exclusive jurisdiction to make an order for substituted service. Nowhere in the amended *Court of Appeal Rules* is the High Court endowed with any power to deal with any matter in relation to the service of a Notice of Appeal.

⁵ *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed., Lexis Nexis, 2020 at 21.4.

27. As a result, this Application must be dismissed. The High Court does not have the jurisdiction to grant an extension of time to serve a Notice of Appeal, or to make an order for substituted service. The Court of Appeal has the exclusive jurisdiction to deal with any issue in relation to the service of a Notice of Appeal.
28. The *Senior Courts Act* came into force in November 2022 and brought with it some fundamental changes to the structure of Belize's judicial system. Our Court's early interpretation of the *Senior Courts Act* reveals a shift in the High Court's jurisdiction to intervene in matters relating to civil appeals. Under the *Senior Courts Act*, the Court of Appeal now enjoys exclusive jurisdiction to grant leave to appeal and to make orders in relation to the service of a Notice of Appeal.
29. As both the Bench and the Bar adjust to this new structure, counsel are advised to carry out an in depth analysis of the newly adopted *Senior Courts Act* and of the amended *Court of Appeal Rules* to ensure that applications that could previously be made to the Supreme Court (now High Court) in relation to civil appeals should not now be made directly to the Court of Appeal.

Application for Stay of Execution

30. Under the *Senior Courts Act* and the amended *Court of Appeal Rules*, the High Court has retained the jurisdiction to make an order for the stay of execution of its judgment pending the appeal. This jurisdiction is clearly laid out in sections 16(c), 17, and 19 of Order II of the *Court of Appeal Rules*. I note that pursuant to section 17, an application for stay of execution should normally be made to the Court of Appeal, unless doing so would cause undue inconvenience or delay. I do not understand the Respondent to be disputing this.
31. I find that the circumstances call for a stay of execution of my Judgment. The appeal has some prospect of success. The appeal raises questions of law and facts that are not frivolous or fanciful. While the Respondent is correct in noting that the Notice of Appeal has not been provided with the Application, I note that the Applicant's contentions on appeal are listed in the "Grounds" section of the Application for Stay of Execution.
32. It is in the interest of justice to grant the stay of execution. The Judgment orders legal title to the two properties at issue in the Claim to be transferred to the Claimant, as Executor of the estate of Kathleen Tiabo, forthwith. There is a risk that the appeal be made nugatory should the properties be disposed of, or their value be in any way affected by the conduct of the Respondent. The stay would not prejudice the Respondent, as I do not understand him, or any other family member, to be residing in either of the properties.
33. Both properties, or part thereof, are currently being leased to third parties. The outcome of the appeal may affect who is entitled to collect rental income on these properties. It is

appropriate to order that any rental income collected from December 5th, 2022 until the determination of the appeal be placed in the escrow account of one of the attorneys in this matter. Counsel for the Applicant, Mrs. Myles, offered to place the sums collected into her firm's escrow account. This was not contested by Counsel for the Respondent, who in any event did not make a similar offer. An order will be made accordingly.

34. The Applicant requests an order that he remains in control of the upper section of the Ebony Street Property until determination of the appeal in this matter. Since the stay essentially operates to maintain the *status quo* as of the date of the Judgment, this order will be granted.

Costs

35. Given that each party was successful on one of the two Applications, each party will bear their own costs.

IT IS HEREBY ORDERED THAT

- (1) The Application for extension of time to serve the Notice of Appeal or for substituted service is dismissed.
- (2) The Application for a stay of execution of the Judgment of this Court dated December 5th, 2022, is granted.
- (3) Any rental income collected from either of the properties subject to the Judgment of this Court between December 5th, 2022 until the determination of the appeal shall be paid and remain into the escrow account of Myles & Banner, save and except for the payment of property taxes and for the maintenance of the properties.
- (4) The Applicant shall remain in control of the upper section of the Ebony Street Property until the determination of the appeal.
- (5) Each party shall bear their own costs.

Dated May 2nd, 2023

Geneviève Chabot
Justice of the High Court