IN THE COURT OF APPEAL OF BELIZE AD 2012
CIVIL APPEAL NO 37 OF 2010

(1) **INES HERMILO VALENCIA GONZALEZ (deceased)**
(Executor of the Estate of Isela Valencia Gonzalez)
(2) **HILDA VALENCIA CAMPO** Applicant

v

(1) **TOMAS VALENCIA GONZALEZ (deceased)**
(2) **ADOLFO PEREZ VALENCIA** Respondents

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

N Barrow for the applicant.
F Lumor SC for the respondent.

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9 and 17 July 2012 and 28 March 2013.

SOSA P

Introduction

[1] This was an application ('the application') by Hilda Valencia Campo ('the applicant') for the restoration of Civil Appeal No 37 of 2010 ('the appeal').

[2] The relevant notice of motion was filed on 3 February 2012 and the application heard on 9 July, when the Court reserved its decision. Having considered such decision, the Court granted the application on 17 July, ordering that the appeal be restored under Order II, rule 15 (3) of the Court of Appeal Rules ('the Rules') but making no order as to costs. Reasons for writing having then been

promised, I shall now give mine. (In so doing, I shall refer to the parties and other persons mostly by their first names for the sake of convenience and with no intention of being disrespectful.)

The background

[3] Claim No 261 of 2007 was filed in the court below by Tomás Valencia González, now deceased ('Tomás') and Adolfo Pérez Valencia ('Adolfo') against Ines Hermilo Valencia González, also now deceased ('Ines') and the applicant, Ines being so sued as 'Executor (*sic*) of the Estate of Isela Valencia González' ('Isela'). (It is important to note that, whilst it may be true that Ines was one of three executors named in the will of Isela, what he (alone) received from the court was a grant of administration *cum testamento annexo*, as a result of which he stood properly to be described either as executor of the will of Isela or as administrator of her estate, but not as executor of such estate.) Sadly, Ines passed away on 3 December 2009, more than five months before the commencement of the hearing of the claim on 19 May 2010 in the court below. (According to a death certificate adduced in evidence in the court below as well as at the hearing of the application, and whose relevance to the proceedings is not in dispute, 'Ines Ermilo Valencia González' died, aged 81, from multiple causes including senile dementia.) Upon the commencement of the hearing, the Registrar General was, on the application of Tomás and Adolfo, appointed by the court of first instance to represent the estate of Ines (not that of Isela). The hearing thereafter proceeded, reaching its conclusion on 20 May 2010, and the relevant judgment was delivered by Conteh CJ on 28 September 2010. That was followed by the order which later became the subject of the appeal and which, as material for present purposes, reads:

> 'IT IS ORDERED that:
>
> 1. The declaration is granted that the First Defendant, Ines Hermilio Valencia Gonzalez (deceased), acted improperly and in breach of his duties as Executor/Trustee of the Estate of Isela Valencia Gonzalez when he purportedly sold the property situate at No. 28 Corner Queen Street and New Road, Belize City ("the Valencia Building") to his daughter, Hilda Valencia Campo, the Second Defendant.

2. The declaration is granted that the said Second Defendant, Hilda Valencia Campo, holds title to the Valencia Building as a constructive trustee for the benefit of the Claimants and the estate of the First Defendant, Ines Hermilio Valencia Gonzalez (deceased).

3. The Second Defendant, Hilda Valencia Campo, should surrender the title to the Valencia Building, Transfer Certificate of Title (TCT) dated 30th April 2007 issued to her and registered in the Land Titles Register Volume 50 at Folio 108 to be cancelled by the Court.

4. The Grant of Probate of the Estate of the late Isela Valencia Gonzalez granted to the First Defendant, Ines Hermilio Valencia Gonzalez (deceased), on 22nd September, 1994 is hereby revoked; a new executor or executors be appointed by the Court to administer the said Estate of the late Isela Valencia Gonzalez.

5. An account or inquiry be taken of what is due to the Estate of the late Isela Valencia Gonzalez or the Claimants from the Defendants.

6. The property at Corner 28 Queen Street and New Road in Belize City, the Valencia Building, be sold subject to the directions of the Court.

7. The prescribed costs of these proceedings are awarded to the Claimants to be paid as follows:

    i) 50% from the Estate of the late Ines Hermilo Valencia Gonzalez, the First Defendant; and

    ii) the other 50% by the Second Defendant, Hilda Valencia Campo.'

[4] On 8 November 2010, the applicant filed a notice of appeal, thus commencing the appeal. But there was, alas, failure thereafter on the part of the applicant (then represented by Mr Welch) to comply with the requirements of Order II, rule 13 (1) of the Rules; and, in consequence, it was, on 28 October 2011, ordered by this Court (Sosa P and Mendes and Pollard JJA) that the appeal be dismissed for want of prosecution.

The governing rule

[5] Order II, rule 15 (3) of the Rules, under which the application was made, provides as follows:

> '(3) An appellant whose appeal has been dismissed under this rule may apply by notice of motion that his appeal be restored and the Court may in its discretion for good and sufficient cause order that such appeal be restored upon such terms as it may think fit.'

Authority

[6] The industry of counsel was not able to unearth any previous decision of this Court in an application made under this rule. For my own part, I was able in the course of oral argument to recall no more than that an application for restoration (which did not result in a written reasoned judgment) had been made some years ago in a matter in which Mr Waithe had appeared. I am, however, now able to say that in that case, viz *Belief v Bethel Assembly of God of Belize*, the application (for the restoration of Civil Appeal No 4 of 2003) was made not under Order II, rule 15 (3) but, rather, under Order II, rule 24 of the Rules, which latter rule is couched in terms materially different from those of the former.

[7] The Court was, however, referred by Mr Lumor SC, for the respondents, to one decision of a court in the Commonwealth Caribbean on such an application, viz *Calderon v Calderon* (1992) 43 WIR 160, a decision of the Court of Appeal of the Eastern Caribbean States (Floissac CJ, Byron JA and Satrohan Singh acting JA). In that case the court was concerned with rule 26 (3) of the Court of Appeal Rules 1968 of the relevant jurisdiction, whose provisions are identical to those of rule 15 (3) in this jurisdiction. Having set out the provisions of rule 26 (3), Floissac CJ, delivering the judgment of the court, said, at page 160:

> 'According to rule 26 (3), the restoration of an appeal is the result of a judicial discretion, the pre-requisite to the exercise of which is good and sufficient cause. Therefore, in order to succeed in his application for the restoration of his appeal, an appellant must establish (1) that there is good and sufficient cause for the restoration, and (2) that there are preponderant circumstances which should incline the court in the interest of justice to exercise its discretion in favour of the restoration.'

I respectfully consider that opinion to be based on a sound reading and interpretation of the relevant provisions, which, I repeat, are common to the rules of both jurisdictions.

Analysis of the grounds and arguments

[8] After some initial hesitation, I was driven to the conclusion, by which I still stand, that there was good and sufficient cause for restoration of the appeal and that the applicant had thus cleared the first of the hurdles recognised in *Calderon*. Taking all necessary care to avoid creating the erroneous impression that issues on the appeal are being prejudged, I shall endeavour to be relatively brief in stating my reasons for so concluding. In the notice of motion, counsel for the applicant presented the grounds of the application in the form of a list of seven points. I consider that, for present purposes, these may conveniently be treated as subsumed under two main headings, viz (i) that the applicant is ready to proceed in pursuit of the appeal, which is arguable and has a reasonable prospect of success, and (ii) that the applicant is in no way to blame for the default which resulted in the dismissal of the appeal for want of prosecution.

[9] As regards the first of these headings, the Court has not been provided by the applicant with the list of proposed grounds of appeal, if any, of the applicant, as it might usefully have been. (The respondents have presented, as an exhibit to an affidavit on which they rely, a copy of the notice of appeal – which was, of course, struck out with the appeal – in which grounds were set out.) But it is the case that Ms Barrow has been quite specific about one intended line of attack upon the judgment of Conteh CJ, viz that it contained an order for costs against the estate of Ines notwithstanding the fact that when, as already noted above, the Registrar General was appointed by Conteh CJ to act as a representative in the claim, the express terms of the order were for her to represent the estate of Ines, even although he had been sued in his capacity of 'executor' of the estate of Isela rather than in his personal capacity. The seeming effect of that order of Conteh CJ, then, if I have correctly understood Ms Barrow, was wrongly to add (by a side-wind, as it were) the estate of Ines as a new defendant in the claim and thus wrongly to expose that estate to the order to pay 50% of the prescribed costs of the claimants in the

proceedings, which order was in fact made. In my view, that is a point which could indeed probably be argued successfully on appeal by the applicant, who, after all, claims an interest, and has applied for grant of probate, in the estate of Ines under his purported will dated 15 December 2006. (I am thinking here not so much of objective fairness as of procedural regularity.) What is more, Mr Lumor has not suggested the contrary. It appears to me, then, that the instant case is distinguishable from *Calderon*, in which the court, in expressing its unwillingness to exercise its discretion, even on the assumption that there was good and sufficient cause to restore, to grant the application to restore, made much of the fact that the unrepresented appellant did not try to satisfy the court that, in the event that the appeal were restored, it would be an arguable one having a reasonable prospect of success: see p 161.

[10] I would add here that, whilst Ms Barrow did suggest that Conteh CJ improperly made other orders against the estate of Ines, she did not attempt to enter into details of the alleged impropriety.

[11] I turn to consider the second of the two headings under which I have grouped the applicant's list of seven points. The good and sufficient cause here sought to be established is that, whilst there was default in filing and leaving with the Registrar the documents in question, such default was entirely the result of the conduct of the applicant's then attorney-at-law. It is not a default, says the applicant, for which she herself bears any blame. According to her affidavit evidence, it was only sometime after a visit paid by her to the Supreme Court Registry, on or about 6 December 2011, that she found out that the date of default was 10 February 2011. On the visit in question to the Supreme Court Registry, so goes her evidence, she had been informed, correctly, that the appeal had been struck out for want of prosecution but, incorrectly, that the approximate date of such striking out was 25 March 2011. In truth, the appeal had been struck out on 28 October 2011. The applicant further deposed that the information so received caused her surprise since Mr Welch had only asked her to prepare the record of appeal in or about May 2011, that is to say, well after the date of default. That was a request, as the applicant went on to depose, with which she had promptly complied, supplying the record to Mr Welch

before the end of that same month. She had not heard thereafter from Mr Welch, despite emails sent and calls made.

[12] Mr Lumor did not seek to dispute the applicant's position as to the proper allocation of blame for the default which caused the appeal to be dismissed. But he sought to challenge her credibility as to the circumstances which led to the default, relying for this purpose on what, according to a purported transcript of the proceedings before this Court on the date of the dismissal, Mr Welch had previously explained to the Court. Without, however, for a moment losing sight of the fact that Mr Welch is an officer of the Supreme Court, I must be guided here by the fact that, unlike the applicant, Mr Welch was not on 28 October 2011 giving sworn evidence before this Court. The applicant swore her relevant affidavit on 3 February 2012, that is to say, well before the hearing of the application before this Court on 9 July 2012; and the notice of motion was filed on 3 February 2012. It is therefore, not unreasonable to believe that there was enough time for Mr Lumor, if he was so minded, to have provided Mr Welch with a copy of the applicant's pertinent affidavit and invited his response in an affidavit of his own.

[13] Such affidavit evidence as was in fact adduced by the respondents with respect to the conduct of Mr Welch serves only to support the claim of the applicant that she is not to carry the blame for the default of 10 February 2011. It is, however, in my view, unnecessary to enter into it for present purposes since the sworn evidence of the applicant suffices by itself to establish her claim of lack of blame for the default in question.

[14] As has been noted above, Mr Lumor neither contended that there is no arguable appeal nor disputed that the fault for the default of 10 February 2011 lies with Mr Welch rather than with the applicant. His primary contention was that restoration should not be ordered for the reason that it would cause serious prejudice to the respondents. He further argued that the applicant did not explain the delay in applying for restoration, pointing out that there was a delay of some 60 days on the part of the applicant in applying for restoration after learning that the appeal had been struck out. The evidence of the applicant was, as already stated above, that she only learned of the striking out on or around 6 December 2011 and the notice of

motion concerned bears the date 3 February 2012 as its filing date. Therefore, from the perspective of the analysis in *Calderon*, Mr Lumor's points fall to be considered under what the court there referred to as 'the second question as to whether the circumstances of this case justify the exercise of a judicial discretion in favour of [restoration]': see pages 160 – 161.

[15] Dealing first with the primary contention of Mr Lumor, the position is that, as Ms Barrow submitted, the respondents have not done much since dismissal of the appeal to pursue their rights under the judgment of Conteh CJ. And of the few steps that have in fact been taken by the respondents, not all date back as far as 3 February 2012, when the notice of motion in respect of the application was, as already noted above, filed. Thus, it was only on 6 February 2012 that there was entered an order of the court below whereby one Jorge L Valencia Gómez was appointed to represent the estate of Tomás, who had died on 18 December 2011. And it was only later, ie on 6 March 2012, that an order was obtained in the court below whereby a certain Irma Yolanda Valencia, who is the mother of Adolfo, was 'appointed the executrix (*sic*) of the Estate of [Isela].' (As noted above, Ines, the administrator *cum testamento annexo* of the estate of Isela, had died as far back as 3 December 2009, some two years and three months earlier.) These are steps that were taken by the respondents and give a somewhat hollow ring, as far as I am concerned, to Mr Lumor's twofold complaint of prejudice to the respondents and tardiness on the part of the applicant. Bearing in mind my earlier conclusion that she is not to blame for the default of 10 February 2011 and that she only found out about the dismissal of the appeal sometime after her visit of about 6 December 2011 to the Supreme Court Registry, I do not consider that the delay from that unknown date to 3 February 2012 can justify a refusal to restore an appeal which is arguable and has a reasonable prospect of success.

[16] Mr Lumor drew an analogy between rule 15 (3) under which, as already pointed out, the application was made and rule 24. But the short (and only necessary) answer is that the analogy is not a valid one. The latter rule, which, as I have previously noted above, was applied by the Court in ***Belief,*** expressly provides that no application to restore an appeal dismissed in default of appearance shall be made 'after the expiration of twenty-one days from the date of the judgment or order

sought to be set aside'. The rule-maker did not, quite obviously, see it fit to provide for the application of such a severe restriction in the case of applications made under rule 15 (3); and there the matter must end.

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SOSA P

MORRISON JA

[17] I have read the reasons for judgment prepared by Sosa P in this matter. I agree with them and have nothing to add.

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MORRISON JA

AWICH JA

[18] I concur in the reasons given by Sosa P. I have nothing to add.

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AWICH JA