Miltiades Neophytou Civil Engineering Contractors & Developers Ltd v. Municipality of Paphos

APPELLATE COURT OF CYPRUS - CIVIL JURISDICTION

(Civil Appeal No. E5/2018)

January 16, 2024

[PANAYIOTOU, PAPADOPOULOU, STYLIANIDOU, Judges]

Miltiades Neophytou Civil Engineering Contractors & Developers Ltd

Appellant

v.

Municipality of Paphos

Respondent

Application dated 19.9.23 for an extension of the time to file the outline of the speech for the respondent

For the respondent-applicant: Ms. Katerina Andreou for Elias Neocleous & Co LLC

For the appellant-respondent: Mr. Konstantinos Messios for C.D. Messios LLC

PANAGIOTOU, D.: The decision of the Court is unanimous.

D E C I S I O N

PANAGIOTOU, D. With this application, the respondent requests an extension of time to file the outline of their speech. The subject of the appeal is the appellant's challenge to the correctness of an interim decision of the first-instance Court dated 21.12.2017, which issued a preservative order prohibiting the appellant from initiating and continuing arbitration proceedings based on an arbitration agreement contained in a contract between the parties.

It was ruled in the first instance that arbitration is not appropriate for resolving the parties' disputes because the respondent, the Municipality of Paphos, intends to raise issues of fraud, which the arbitrator does not have the authority to hear. According to the first-instance decision, the parties' disputes can be adjudicated by a judge with the guarantees offered in a trial before a court, where all arising issues, including the fraud claims raised by the respondent, will be resolved.

At this stage, it is useful to briefly refer to the history of this appeal to understand the positions of the parties regarding the subject matter of the present application by the respondent for an extension of time to file the outline of their speech.

The appeal was filed on 3.1.2018 and scheduled for a preliminary hearing before the Supreme Court on 15.2.2023. On that date, the Supreme Court gave directions to both parties to file their outlines of the speech. The appellant filed her outline on 31.3.2023, while the respondent failed to file his outline according to the above directions.

Subsequently, the appellant filed an application dated 27.6.2023 for the submission of further evidence to the Court of Appeal, which was scheduled before us on 13.9.2023. On that date, we pointed out to the respondent that the outline of the speech had not been filed by them. Following this, on 19.9.2023, the present application was filed, in which the respondent requests an extension of time to file their outline by 5 days.

It should be noted that this application was filed using the form of the old Civil Procedure Rules and is based, among other things, on Orders 57.R.2 and 48 and the Appeals Procedural Regulation of 1996. In the affidavit accompanying this application, it is claimed that the respondent's lawyers mistakenly believed that the outline of the speech in their file had been filed. The said outline is attached to the affidavit as Exhibit 1.

The appellant opposes the approval of the request, arguing that the application is procedurally incorrect and invalid from the outset. Specifically, according to the new Civil Procedure Rules of 2023, a request for relief from sanctions under Part 3.6 should have been made first, before filing this application for an extension of time.

The appellant also refers to Part 41.18(2), which states that in the case of a failure to file an outline of the speech by any party, the automatic sanction is that they are not entitled to be heard at the appeal hearing. According to the appellant, for the respondent to be authorized to file the present application and to be heard by the Court of Appeal, they should have filed the application for relief from sanctions as provided by Part 3.6 of the Civil Procedure Rules of 2023.

Regardless of the above, the appellant argues that the procedure in this application has not been initiated in the manner prescribed by the Civil Procedure Rules of 2023. Specifically, the application was not filed using the correct form (Form 34) and does not comply with the requirements of Part 23.4 of the Civil Procedure Rules of 2023.

On the substance of the application, the appellant emphasises the necessity of complying with the Civil Procedure Rules of 2023 to preserve the Primary Purpose of the Rules and to promote a more disciplined approach by the parties in handling court proceedings.

We have studied the respective positions of the parties. The first issue that will concern us is the appellant's position that, before filing the present application, the respondent should have obtained relief from sanctions under Part 3.6 of the Civil Procedure Rules of 2023 and specifically relief from the sanction imposed on the respondent in Part 41.18(2), due to the failure to file the outline of the speech.

It should be noted that according to Part 41.18(2) of the Civil Procedure Rules of 2023:

"If the respondent fails to file an outline of the speech, the appeal is scheduled for hearing, and the respondent is not entitled to be heard at the appeal hearing."

It follows from the above procedural provision that the sanction imposed on the respondent for failing to file the outline of the speech is limited to being barred from speaking at the appeal hearing. This sanction does not extend to other procedural actions, particularly the respondent's right to file an application for an extension of time to file the outline of the speech, as defined in Part 41.16(6) of the Civil Procedure Rules of 2023.

Therefore, the appellant's position that the respondent is prevented from filing the present application for an extension of time without obtaining relief from sanctions does not apply.

The next issue that will concern us is the appellant's argument regarding the incorrect form of the present application.

We agree with the appellant's position that the application was not filed using the prescribed form (Form 34) provided by the current Civil Procedure Rules of 2023.

It is noted that on 3.7.2023, the Civil Procedure Rules of 2023 came into force for the Court of Appeal (see Part 60.1(1)). It is clear that for the Court of Appeal, there is no specific provision allowing for the application of the old rules in pending proceedings filed before the implementation of the 2023 Rules, unlike other jurisdictions of the first-instance Courts.

Regardless of the above, we note that the present application was filed on 19.9.2023, i.e., after the implementation of the Civil Procedure Rules of 2023. Therefore, despite the fact that the appeal has been pending since 2018, within the context of this

application, the applicant-respondent should have followed the procedure and form prescribed by the 2023 Rules, which were in force at the time of filing this application. Specifically, the application should have been filed using Form 34 and include all the elements mentioned in Part 23.4 of the Civil Procedure Rules of 2023.

We observe, however, that the respondent filed the present application using the form of the old Rules. Moreover, they erroneously base their application on the Appeals Procedural Regulation of 1996 and the old Civil Procedure Rules (Orders 57.R.2 and 48) and not on Part 41.16 (6), which provides the Court of Appeal with the authority to extend the time for filing the outline of the speech.

It is indicative that no reference is made to the Civil Procedure Rules of 2023 in the present application. On the contrary, it is the applicant's position, as it emerges from the arguments of his counsel, that the old Rules apply since the appeal concerns 2018.

We do not agree with this view. Part 60.2(1) of the 2023 Rules, invoked by the respondent-applicant's counsel in their arguments, does not assist the respondent's case as it refers to the exercise of discretion by the Court in proceedings commenced before the date of entry into force of the 2023 Civil Procedure Rules. It is reiterated that the present application was filed after the implementation of the 2023 Rules. Therefore, based on the aforementioned provisions of Part 60, the applicant was obliged, regardless of the pending appeal since 2018, to follow the procedural form provided in the new 2023 Rules, i.e., Form 34.

In light of the above observation, we will next examine whether the respondent's omission constitutes an irregularity that could be overlooked to preserve the procedure of this application. The respondent's counsel referred, in this regard, to the Primary Purpose of the Civil Procedure Rules, which allows the Court to handle cases fairly and at a proportional cost.

The handling of cases within the framework of the Primary Purpose includes, among other things, according to Part 1.2(2), saving costs, ensuring expeditious and fair treatment, and enforcing compliance with rules and orders. It also includes, according to Part 1.2(2)(c), handling a case in ways that are proportionate to, among other things, the seriousness of the case and the complexity of the issues at stake.Relevant to the issue are also the provisions of Part 3.8 of the Civil Procedure Rules of 2023, which are as follows:

3.8 General power of the court to rectify matters when there has been a procedural error

(1) When there has been a procedural error, such as failure to comply with a rule:

(a) the error does not invalidate any step in the proceedings unless so ordered by the court; and

(b) the court may issue an order to rectify the error.

(2) A court does not issue an order to nullify any step unless it is satisfied that:

(a) the procedural error was serious; and

(b) such an order is necessary in the interest of justice, considering the primary purpose.

Having considered the aforementioned provisions and despite our finding that the respondent's choice to submit the application using the form of the old Regulations was not appropriate, we judge that this procedural error does not automatically lead to the exclusion and rejection of the application. The application contains all necessary elements for its progression and examination without affecting the rights of any third party.

Rescuing the process in this manner aligns, in our judgment, with the Primary Purpose of the 2023 Civil Procedure Rules, which is to ensure the right of access to the Court in a fair and effective manner and to interpret the Rules to avoid unnecessary procedures concerning procedural matters. It also aligns with Part 3.8(1), which indicates that a party's failure to comply with these Rules does not invalidate the process and that the Court may issue an order to correct the error in the case of such non-compliance.

Additionally, under Part 3.8(2), the process is not invalidated unless the error is serious and annulment is necessary in the interest of justice, considering the Primary Purpose. In this case, for the reasons explained above, such as the application containing all necessary elements for its examination without affecting the rights of any third party, we judge that the error is not serious, and the annulment of the application is not necessary for justice. On the contrary, considering all the above and

the Primary Purpose of the Rules, we find it in the interest of justice not to annul the current process despite the incorrect application form used to promote it.

This approach was also followed by the Supreme Court in the case *A.G. PAPHITIS & CO, LLC* Civ. App. 112/2023 dated 22.9.2023, ECLI:CY:AD:2023, concerning a request for an extension of time to file an application for a prerogative writ of Certiorari The application was filed using the wrong form and did not comply with the forms prescribed by the 2018 Supreme Court (Prerogative Writs Jurisdiction) Procedural Rules.

We should note that our decision not to annul the current process should not be interpreted as encouraging violations of procedural rules by using incorrect forms in procedural actions. This case is judged strictly on its own facts, as detailed above, particularly in light of the recent implementation of the 2023 Civil Procedure Rules, and it does not set a judicial precedent for tolerance of violations of these Rules.

In view of the above findings, we proceed to examine the respondent's substantive request for an extension of time to file the outline of the speech.

The extension of the time for compliance with the deadlines set by the 2023 Civil Procedure Rules is generally governed by Part 3.1(2)(a), which grants the Court the authority, among other things, to extend the compliance period provided in any rule (even if an application for an extension is submitted after the compliance period has expired). Specifically, for the outlines of speeches, Part 41.16(6) states that "the deadline for submitting outlines of speeches may be extended by the Court of Appeal, as deemed necessary in the interest of justice."

The jurisprudential principles regarding the issue of extending the time for filing an outline of a speech are summarised in the Supreme Court's decision in *Konstantinos Panteli v. Iacovou Brothers* (Construction) Ltd et al., Appeal 111/2017 dated 25.1.23. This jurisprudence is relevant to the present case, even though it is based on Regulation 12 of the Supreme Court (Pre-trial, Outlines of Speeches, Limitation of Oral Speeches Time and Summary Procedure for Dismissing Obviously Unfounded Appeals) Procedural Regulation 4/1996. This is because the Supreme Court Regulation, like Part 41.16(6) of the 2023 Civil Procedure Rules, states that "the deadline for submitting outlines of speeches may be extended by the Court of Appeal, as deemed necessary in the interest of justice."

In the case of Konstantinos Panteli, it was mentioned, among other things:

"It goes without saying that deadlines should be observed for obvious reasons. A deadline may be extended if it is found that the relaxation does not undermine the administration of justice (*Municipality of Strovolos v. Yasemidou et al.* (1997) 3 AAD 104). The circumstances that would allow or not allow an extension of time cannot be exhaustively listed in advance (*Miaris et al. v. Laiki Cypriot Bank Ltd* (2009) 1(A) AAD 435, 441). Each request is examined based on the surrounding facts."

In the same case, the Supreme Court, referring to the decision Nicholas v. Republic of Cyprus through the Public Service Commission Appeal against the Decision of the Administrative Court 58/16 dated 2.2.2022, ruled that it was in the interest of justice to approve the extension request since, among other things, the appeal had not yet been set for a hearing, and thus the respondent would not suffer any harm.

The following excerpt from the case of *Nicholas* (above) is also relevant:

"The absence of adverse effects from non-compliance with deadlines is highlighted in the case *Municipality of Strovolos v. Michael et al.* (1997) 3 A.A.D. 104, which emphasises that forgiveness is possible and deviation from the set time is permissible if required in the interest of justice. (See also *Mavromoustakou et al. v. Registration Council of Food Scientists, Food Technologists and Dietitians* (2001) 3B A.A.D. 850, Municipality of *Strovolos v. Yasemidou* et al. (1997) 3 A.A.D. 104 and *Republic v. Christodoulou et al.* (1997) 3 A.A.D. 241)."

In this case, the respondent cites an error by his lawyers, who mistakenly believed that the outline of the speech they had prepared and kept in their file had been filed. The appellant, on the other hand, insists on strict adherence to deadlines, advocating for a more disciplined approach to the rules by the parties. In any case, this claim of a mistaken impression regarding the respondent's outline filing is supported by the fact that the omission was only noticed after the Court of Appeal pointed it out to his lawyers during their appearance in another application by the appellant on 27.6.2023 to submit further evidence in the Court of Appeal. It is clear that until that point, the respondent's lawyers believed that the outline had indeed been filed.

Considering the above specific circumstances of this case, along with the aforementioned jurisprudential principles, we do not find that any harm will be caused

to the appellant if the application is approved. Notably, the appeal has not yet been scheduled for a hearing, and therefore, granting the request for a five-day extension will not cause any delay in the hearing (see *Konstantinos Panteli* above). Additionally, the appellant's application to submit evidence during the appeal is still pending before us, which will necessarily be adjudicated before the appeal hearing.

In light of all the above, we find it in the interest of justice to approve the respondent's request for a five-day extension to file the outline of the speech.

It is directed that the respondent's outline of the speech be filed within five days from today.

Regarding the costs of the application, as has been established, the primary criterion in exercising the Court's discretion is the responsibility of the parties for incurring the costs (see *Phylactou v. Michael* (1982) 1 CLR 204).

In this case, the appellant is not at any fault for creating the costs of the application. The application for an extension of time to file an outline by the respondent became necessary due to the mistake of his lawyers, who mistakenly believed that the outline in their file had been filed.

In light of the above, we find it appropriate and fair that the costs of this application, as calculated by the Registrar, be awarded in favor of the appellant (the respondent in this application) and against the respondent (the applicant).

A. Panayiotou, Judge

M. Papadopoulou, Judge

I. Stylianidou, Judge