

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 0065/2005  
(High Court Civil Action HBC 203 of 1999L)

BETWEEN:

KOLINIO NAULAGO

Applicant

(Defendant in the High Court)

AND:

NBF ASSET MANAGEMENT BANK

Respondent

(Plaintiff in the High Court)

Date of Hearing: 28 November 2005

Counsel: T. Sharma for the Applicant  
H.K. Nagin for the Respondent

Date of Decision: 14 December 2005

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**DECISION**

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[1] This is an application for leave to appeal out of time against a judgment of the High Court at Lautoka (Connors J) dated 29 June 2005.

[2] The following affidavits were filed:

- (i) Mosese W.V. Naivalu, 17 August 2005, in support;
- (ii) Mosese W.V. Naivalu, 23 August 2003, in support;
- (iii) Manoj Kumar Rai, 5 October 2005, in opposition.

[3] The protracted chronology of the litigation, as appears from the papers, is as follows:

- (1) Writ filed, 15 June 1999;
- (2) Defence filed 9 August 1999;
- (3) Plaintiff's Notice of Intention to proceed (RHC O 3, r5) filed 14 February 2001;
- (4) Plaintiff's second Notice of Intention to proceed filed 21 January 2003;
- (5) Application for summary judgment under RHC O 14 filed by the Plaintiff, 4 August 2003;
- (6) Summons served on Defendant, 5 August 2003;
- (7) First call of Summons - 26 September 2003 – Defendant present – adjourned to 14 November 2003;
- (8) 14 November 2003 - no appearance by the Defendant, matter adjourned to 23 January 2004;
- (9) 23 January 2004 - no appearance by Defendant – summary judgment entered in favour of Plaintiff;
- (10) April 2004, Defendant becomes aware of summary judgment entered against him;
- (11) 7 September 2004, Defendant files application to set aside summary judgment entered on 23 January 2004;
- (12) 14 June 2005, application to set aside summary judgment dismissed. Ruling published ;
- (13) 29 June 2005, Order of 14 June 2005 sealed.

[4] On 4 August 2005 the Applicant's solicitors agents attempted to file a Notice of appeal against the order sealed on 29 June 2005. According to paragraph 7 of the first affidavit the notice was rejected by the registry since neither a copy of the judgment nor a copy of the sealed order was attached to the notice.

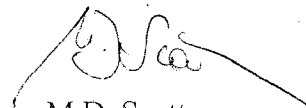
- [5] The present application for leave to appeal out of time and for a stay of execution of the order of 14 June 2005 pending disposal of the appeal was filed on 18 August 2005.
- [6] Unfortunately, neither counsel was able to tell me the value of the Judgment entered against the Defendant on 23 January 2004. Neither was I supplied with copies of the affidavit filed in the High Court on behalf of the Plaintiff on 26 June 2003 nor with copies of the four other affidavits considered by the High Court on 14 June 2005.
- [7] As will be seen from the first affidavit herein, the thrust of the Applicant's submissions is that he has been deprived of his right to appeal within time by the "inconsistency" of the Court of Appeal registry's decision to reject his papers filed on 9 August. The Applicant's solicitors point out that there is no practice direction requiring a copy of the judgment and sealed order to be filed with the appeal papers.
- [8] In paragraph 14 of his first affidavit the Applicant's solicitor also states:
- "I am advised by my counsel that the intended appeal would have a reasonable prospect of success if leave were granted and the delay is deplorable and that the reasons for the delay is a justiciable one. (sic)"
- [9] The intended grounds of appeal annexed to the first affidavit complained that the High Court:
- (i) erred in law in rejecting the (Applicant's) explanation that he had not been properly notified of the mention date 23 January 2004;
  - (ii) erred in law in finding the 5 months delay between April 2004 and September 2004 to be unreasonable; and

(iii) erred in law in finding that the (Applicant) had no defence on the merits.

- [10] The first question is whether the Court of Appeal Registry was right to reject the Notice of Appeal offered for filing by the Applicant on 9 August. In my view it was. Rule 16 of the Court of Appeal Rules requires a Notice of appeal in the case of a final judgment to be filed and served within six weeks of the date on which the Judgment in question was "signed entered or otherwise perfected". In Dr. Patrick Muma v. USP & Ors (1991) 37 FLR 109 this Court confirmed that time begins to run on the date that the Judgment is actually sealed. In order that the Registry be able to be satisfied that the Notice of Appeal is not being presented for filing after the appeal period has expired, it is necessary for a copy of the sealed Judgment or Order of the High Court to be presented to the Registry together with the Notice which it is desired to file. This requirement is well known within the profession. If the Applicant's solicitors had not left it to the very last moment to present the Notice, the consequences of failing also to present a copy of the sealed judgment would not have included the appeal period expiring.
- [11] The second question is whether the appeal period, having expired, leave to file the Notice out of time should now be given.
- [12] As pointed out by this Court in Kenneth John Hart v. Air Pacific Ltd Civ. App. 23/83 – FCA B/V 84/317:

"Once an appellant allows the time for appealing to go then his position suffers a radical change. Whereas previously he was in a position to appeal as of right he now becomes an applicant for a grant of indulgence by the Court. The onus rests on him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."

- [13] As already pointed out, while this application was eventually supported by a copy of the Judgment impugned, neither the Respondent's claim nor the Applicant's defence was disclosed. Although it is stated in the grounds of appeal that the judge erred, no particulars of the way in which the errors were said to have occurred were offered. Beyond the bare assertion of error there is no material disclosed to suggest that those assertions have any substance.
- [14] In his ruling delivered on 14 June 2005, the Judge explained that he had considered the Applicant's defence and found it to be without merit. There is nothing in the papers presently filed to suggest that the conclusions reached by the Judge were in any way erroneous.
- [15] The whole conduct of this litigation by the Applicant suggests a long drawn out attempt to avoid the consequences of not repaying a loan extended to him by the Respondent bank. In the absence of anything to suggest a meritorious defence I am not of the view that the ends of justice would be met by prolonging that process any further. The application for leave to appeal out of time and the application for a stay are both dismissed.



M.D. Scott  
Justice of Appeal

14 December 2005