

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT
CIVIL JURISDICTION

APPEAL NO: ABU 28 OF 2013
(High Court Civil HBC 25 of 2004 Lbsa)

BETWEEN : **VUNIMOLI SAWMIL LIMITED AND**
BASHU KHAN

Appellants

AND : **AMRIT SEN**
MOHAMMED YASIN
YU SHIN HO

Respondents

Coram : **Calanchini P**

Counsel : **Mr S Valenitabua for the Appellants**
Mr G O'Discoll for the Respondents

Date of Hearing : **23 August 2013**

Date of Decision : **20 December 2013**

DECISION

[1] This is an application by the Appellants for leave to appeal out of time. The application is made pursuant to Rule 27 of the Court of Appeal Rules, the effect of which is that an application for an extension of time for filing and serving a notice of appeal filed out of time is required to be made to the Court of Appeal. Under section 20 of the Court of Appeal Act Cap 12 a judge of the Court may exercise the power of

the Court of Appeal to, amongst other things, extend the time within which a notice of an application for leave to appeal may be given.

- [2] In the same application the Appellants sought an interim stay order pending the determination of the application for an extension of time to appeal and also stay pending the outcome of the appeal.
- [3] The application was supported by an affidavit sworn by Bashin Khan on 10 June 2013. An answering affidavit sworn on 12 July 2013 by Mohammed Yasin was subsequently filed on behalf of the Respondents.
- [4] On 5 July 2013 I made a number of orders, including an interim order to the effect that the Respondent was not to proceed with a proposed taxation of costs in the proceedings in the court below until this application had been determined.
- [5] The Appellants are seeking leave to appeal out of time against the decision of the High Court delivered on 26 September 2012 whereby the learned Judge refused an application by the Appellants to amend their Statement of Claim and ordered the Appellants action be struck out. The learned Judge ordered that the costs of the Respondent be taxed if not agreed.
- [6] The Appellants had initially commenced proceedings in the Magistrates Court seeking the recovery of a truck tray or its value from the Respondents. The proceedings in the Magistrates Court were struck out on an application by the Appellants to discontinue the claim. The application was made by the Appellants after two witnesses for the Plaintiff had given evidence. It would appear that the Second Appellant (the Plaintiff) had not given his evidence first and was not permitted to give his evidence since he had remained in court whilst the first two witnesses had given evidence. The Magistrate granted the application and the proceedings were struck out when the claim was part heard.
- [7] The Appellants had then commenced fresh proceedings in the High Court by writ and statement of claim. By notice of motion dated 27 August 2008 the Appellant sought leave from the High Court to amend the Writ and the Statement of Claim. That

application was initially heard by Master Udit in Labasa on 3 September 2008. On 5 September 2008 in a written Ruling the Master dismissed the application on account of procedural defects and ordered costs in favour of the Respondents. The Master indicated that he had not considered the application on its merits and as a result the Appellants were at liberty to pursue the application by filing a regular summons and affidavit. It was that renewed application in regular form that came before the learned High Court Judge and upon which he delivered his written Ruling on 26 September 2012.

- [8] The present application was filed on 11 July 2013. On its face the application is out of time by a considerable number of months. The actual length of the delay depends upon whether the Ruling is final or interlocutory in nature. This is relevant because Rule 16 of the Court of Appeal Rules (the Rules) requires a notice of appeal to be filed and served within 21 days in the case of an interlocutory order and 6 weeks in any other case. Time runs from the date on which the order or judgment of the court below was pronounced. The test for determining whether an order is final or interlocutory was settled by this Court in **Goundar –v- Minister for Health** (unreported ABU 75 of 2006; 9 July 2008).
- [9] Whether the application should be granted and time extended for filing and serving a notice of appeal involves the exercise of a discretion. The factors to be considered by a court in an application such as the present were considered by the Supreme Court in **NLTB –v- Ahmed Khan and Anor** (unreported CBV 2 of 2013; 15 March 2013). On the basis of that decision, it is necessary to consider in this application (a) the length of the delay, (b) the reason why the application for leave or the notice of appeal was not filed within time (c) whether there is a ground of appeal that, in this case, not only merits consideration by the Court of Appeal but is a ground that will probably succeed and (d) whether the Respondent will be unfairly prejudiced if time is enlarged?
- [10] The length of the delay is calculated from the date the judgment in the High Court was pronounced being 26 September 2012 to the date the application was filed and served. The application was filed on 11 June 2013 and served on 26 June 2013. If the High Court judgment was an interlocutory judgment then the application for leave to

appeal was required to be filed and served within 21 days and should therefore have been filed and served no later than 17 October 2012. If the judgment of the High Court is a final judgment, then the notice of appeal was required to be filed and served within 42 days and should have been filed and served no later than 7 November 2012. The application is at the very least over 7½ months late and possibly just over 8 months late. The delay is substantial.

[11] The explanation for the delay is set out in some detail in the affidavit of Bashir Khan sworn on 10 June 2013. It would appear that the Applicants had retained a firm of solicitors who had appeared for them at the hearing of their application before the learned High Court Judge. It is claimed that, although a copy of the judgment pronounced on 26 September 2012 was handed to their Counsel the Applicants were not informed of the Court's decision. It is claimed that they were never at any time advised by their solicitors that a judgment had been delivered. It is apparent from the correspondence exhibited to the affidavit that the Applicants were not happy with the manner in which their solicitors at that time were handling their litigation in the courts in Labasa. There is included in the exhibits a copy of a letter to the Office of the Chief Registrar setting out a formal complaint pursuant to section 99 of the Legal Practitioners Decree 2009. I am satisfied on the material in Khan's affidavit that the explanation for not becoming aware of the existence of the judgment until 11 February 2013 was reasonable and that the delay to that point could not fairly be attributed to the Applicants.

[12] However there is the issue of the delay from 11 February 2013. In paragraph 14 of his affidavit, the deponent Khan explained that the application had mistakenly initially been filed in the High Court. Although no details are provided in the affidavit as to when the applications were filed and served, it would appear that the matter came before a judge of the High Court on 10 June 2013. Since the application to extend time for appealing had been filed after the time to lodge a notice of appeal had expired the learned Judge allowed the application to be withdrawn to enable the application to be made to this Court pursuant to Rule 27 of the Court of Appeal Rules. The failure to follow the correct procedure which was set out in the Court of Appeal Rules was an error on the part of the Applicants' legal practitioners.

[13] In **Gatti –v- Shoosmith** [1939] 3 All ER 916 the Court of Appeal at page 919 observed:

“ ___ the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser may be a sufficient cause to justify the court in exercising its discretion ___ there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case.”

[14] However by 2008 the approach taken by the Court of Appeal in Fiji to mistakes by and incompetence of legal practitioners as a ground for seeking an enlargement of time to appeal had hardened. In **Vimal Construction and Joinery works Limited and Another –v- Vinod Patel and Company Limited** (unreported ABU 93 of 2006; 15 April 2008) this Court stated at paragraph 15:

“ ___ in 2008 litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence in the nature of flagrant or serious incompetence ___ is required.”

[15] Although the affidavit material in support of the application omits certain essential details in relation to the actions taken by the Applicants after they became aware of the judgment, I am satisfied that there is evidence to support the claim that the delay in filing and serving the present application was due in part to the incompetence of their legal advisers. However I am not satisfied that the material by itself sufficiently explains the delay between 11 February 2013 and 11 June 2013.

[16] Therefore, notwithstanding the length of the delay and only a partially satisfactory explanation put forward by the Applicants, the exercise of the Court’s discretion does, in this case, depend to some extent on the merits of the proposed appeal. As Thompson JA in **Tevita Fa –v- Tradewinds Marine Ltd and Another** (unreported ABU 40 of 1994; 18 November 1994) observed at page 3:

“However, as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.”

[17] In view of the substantial delay from the date of the judgment to the date of filing of the present applications, the Applicants must establish that there is a ground of appeal that has a high probability of succeeding. In assessing the probability of success of any one ground of appeal, the function of this Court at this stage is not to consider in detail the merits of any particular ground of appeal. Although the distinction between the two tasks is fine, it is not the function of a single judge exercising the jurisdiction given under section 20 of the Court of Appeal Act to adjudicate the appeal.

[18] In the event that leave to appeal out of time were granted the Applicants sought to rely on the following grounds of appeal:

- “1. The Learned Judge erred in law in holding that the High Court claim of the Appellants is an abuse of process due to the Henderson Rule.*
- 2. The Learned Judge erred in law and in fact in holding that the Appellants’ claim had been struck out after the hearing proceeded and as such the institution of the High Court proceedings tantamount to duplicity of proceedings.*
- 3. The Learned Judge erred in law and fact in not holding that the Appellants are entitled to file the High Court Action after withdrawing the Magistrates’ Court case before trial.”*

[19] The grounds of appeal are aimed at the decision of the learned High Court Judge to dismiss the Applicants’ action on account of the discontinuance of the earlier part heard proceedings in the Magistrates Court.

[20] The Magistrate granted the application and in the words of the learned High Court Judge which appear in his judgment the court ordered the action to be struck out and summarily assessed costs in the sum of \$200.00.

[21] Order XII of the Magistrates Courts Rules deals with the discontinuance of actions in the Magistrates Court. Order XII Rule 1 has two limbs. The first limb provides for

discontinuance prior to the date fixed for hearing and requires notice to be given to all other parties. The discontinuance is not available as a defence to any subsequent action. The second limb provides for discontinuance in any other case, that is, at any time after the date fixed for hearing and includes an application to withdraw made during the hearing. The Court may allow the discontinuance on such terms as to costs and as to any subsequent action as seems just.

[22] In this case the Magistrate granted the Applicants' application to discontinue the action during the course of the hearing and ordered costs to be paid. There were no other orders made. Neither party has at any stage sought to appeal the orders made by the Magistrate. Those orders remain undisturbed. It was not necessary nor appropriate for the learned Judge to go behind those orders.

[23] Order XII Rule 2 clearly contemplates the commencement of a subsequent action for the same or substantially the same cause of action which may be stayed pending the payment of costs ordered in the earlier discontinued action.

[24] In the circumstances of this case it seems to me that once the Applicants had paid the costs ordered by the Magistrate, they were entitled to commence fresh proceedings. There is authority for the proposition that the discontinuance of an action is no bar to a subsequent action for the same cause of action: **The Kromprinz** (1887) 12 App. Cas 256 at page 262. The only qualification to that general statement of law is that the right is subject to compliance with any further orders imposed by the Court that granted the discontinuance.

[25] I have concluded that the grounds of appeal relied upon by the Applicants have a sufficiently strong chance of succeeding to warrant the granting of leave to appeal out of time. Whilst I accept that there may be some prejudice to the Respondents, in this case the interests of justice dictate that this appeal should be considered by the Court of Appeal.

[26] In addition, there are examples of leave to file an appeal out of time having being granted even though the delays have been considerable and the explanations unsatisfactory when (1) the grounds of appeal raised issues of general importance

NLTB –v- Lesavua and Another Misc. No. 1 of 2004; 18 March 2004), (2) the grounds of appeal raised important questions of law that merit the consideration of the Court of Appeal (**Atami Beci and Others –v- Kaukimoce and Others** Misc. No. 2 of 2009; 20 January 2010) and (3) the grounds of appeal should be considered by the Court of Appeal in the interests of justice (**Narayan –v- Narayan** Misc. No. 14 of 2009; 3 September 2010).

[27] As a result leave is granted to file an appeal out of time on condition that the Applicants pay the costs of this application fixed at \$2000.00 to the Respondents within 21 days. Notice of appeal is to be filed and served within 28 days from the date of this decision. Thereafter the appeal is to progress in accordance with the Court of Appeal Rules.

[28] The interim order previously granted restraining the Respondents from proceeding to taxation of costs in the High Court action is to remain in force until the determination of the appeal.

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HON. MR JUSTICE CALANCHINI
PRESIDENT

