

**IN THE COURT OF APPEAL**  
**AT SUVA**

**CIVIL APPEAL NO. ABU 37 OF 2011**  
**(High Court No. HBC 258 of 2008)**

**BETWEEN** : **GHIM LI FASHION (FIJI) LIMITED** *Appellant*

**AND** : **CHALLENGE ENGINEERING LIMITED** *Respondent*

**Coram** : **Chandra RJA**

**Counsel** : **Mr I. Fa for the Appellant**  
**Mr D. Sharma for the Respondent**

**Date of Hearing** : **6 June 2014**

**Date of Ruling** : **2 October 2014**

**RULING**

[1] The Appellant and the Respondent had entered into a sale and purchase agreement on 12<sup>th</sup> October 2006, the subject matter being Crown Lease No.5088 on DP 4379 which was owned by the Appellant. The Respondent having paid an initial deposit had indicated that they did not wish to proceed with the purchase. The Appellant had refused to accept the Respondent's purported termination of the Agreement. The Appellant had re-sold the proper to a third party acting in terms of the terms of the agreement for a lower sum. Thereafter they proceeded to claim liquidated damages from the Respondent and this claim depended on whether the agreement was validly terminated.

- [2] The Respondent had made an application for security for costs and the Appellant made an application for summary judgment.
- [3] The Master dismissed the application of the Appellant for summary judgment by his ruling dated 29<sup>th</sup> April 2011.
- [4] By his Ruling dated 6<sup>th</sup> May 2011 the Master ordered the payment of \$8,000 as security for costs.
- [5] The Appellant sought leave to appeal against the said orders of the Master and Justice Inoke dismissed both applications on 31<sup>st</sup> August 2011.
- [6] The Appellant thereafter filed a summons for leave to appeal in the Court of Appeal with an affidavit in support dated 21<sup>st</sup> September 2011 seeking leave to appeal against the decisions of the Master delivered on 29<sup>th</sup> April 2011 and 6<sup>th</sup> May 2011.
- [7] When the matter came up before a single Judge of the Court of Appeal on 26<sup>th</sup> July 2012 the Appellant moved to file amended summons and affidavit in support and the Respondent was also given time to file answering affidavit and for the Appellant to serve any necessary reply.
- [8] The matter was again mentioned on 25 October 2013 and the Appellant had filed an amended summons seeking leave against the decision of Justice Inoke dated 31<sup>st</sup> August 2011 and filed the same supporting affidavit that had been filed earlier,

which related to the decisions of the Master dated 20<sup>th</sup> April 2009 and 6<sup>th</sup> May 2011 without any reference to the decision of Justice Inoke dated the 31<sup>st</sup> August 2011.

- [9] The Respondent had filed an affidavit in reply and the Appellant moved to file supplementary affidavit and the Respondent was given time to file a replying affidavit and written submissions thereafter. The matter was fixed to be mentioned on 29 January 2014.
- [10] On 29 January 2014 the Appellant was granted further time to file necessary papers and the hearing was re-fixed for 13 March 2014.
- [11] On 13 March 2014 Counsel made oral submissions and the Respondent took up a preliminary objection regarding the irregularity of summons. The Appellant sought time to respond and the hearing was re-fixed for resumption on 25 March 2014.
- [12] On 25 March 2014 the Appellant filed an affidavit dated 12 March 2014 seeking to correct errors in the affidavit of 21 September 2011. The Respondent filed written submissions dated 13 March 2014.
- [13] Justice Inoke's decision refusing to grant leave is an interlocutory decision and Section 12(2)(f) provides for an appeal to be filed regarding any interlocutory order or interlocutory judgment either with the leave of the Judge or of the Court of Appeal. In terms of Rule 16(a) a notice of appeal from an interlocutory decision shall be filed within 21 days from the date of the Order.

- [14] Rule 27 of the Court of Appeal Act (Cap.12) provides for the filing of an application for an extension of time for filing and serving a notice of appeal filed out of time and to be filed in the Court of Appeal Under Section 20 a judge of the Court of Appeal may exercise the power of the Court of Appeal to extend the time within which a notice of an application for leave to appeal may be given.
- [15] The first summons for leave to appeal of the Appellant (which was undated) purported to be an application for leave to appeal against the orders of the Master dated 20<sup>th</sup> April 2009 and 6<sup>th</sup> May 2011 as set out in the supporting affidavit dated 21<sup>st</sup> September 2011. This application therefore was irregular as the Appellant had already appealed against the said orders of the Master and a decision had been made thereon by Justice Inoke on 31<sup>st</sup> August 2011. The resulting position would be that the said application has no validity.
- [16] The Appellant who was granted the opportunity to file an amended summons and affidavit in support, filed an amended summons (undated) according to which the case was mentioned on 25 October 2012. This summons supersedes the earlier summons. In the said summons, the Appellant was seeking leave to appeal against the decision of Justice Inoke dated the 31<sup>st</sup> August 2011. It was therefore the first time that an application was made to challenge the decision of Justice Inoke, which was made almost 14 months after the judgment of Justice Inoke thus failing to keep to the time line of 21 days in terms of Rule 16(a). There was no application for extension of time made by the Appellant in terms of Rule 27 of the Court of Appeal Act.
- [17] The affidavit supporting the said amended summons was the same affidavit filed dated 21<sup>st</sup> September 2011 which as stated above was in relation to the decisions of

the Master and not regarding the decision of Justice Inoke. Thus the affidavit filed in support did not support the amended summons.

- [18] Apart from being out of time in seeking leave to appeal against the decision of Justice Inoke, the supporting affidavit did not support the summons.
- [19] When the matter was taken up on 25 March 2014 the Appellant had filed an affidavit dated 12 March 2014 seeking to correct errors in the affidavit of 21 September 2011.
- [20] In the written submissions filed by the Appellant it has been submitted that the application for leave to appeal is in terms of section 12(2)(f) of the Court of Appeal Act. As stated above the proper application for leave to appeal is the application challenging Justice Inoke's decision. That application had been made by the amended summons (undated) which was in the Court record on 25<sup>th</sup> October 2012. Assuming that it had been filed on or about the 25<sup>th</sup> of October 2012 it has been filed out of time and therefore cannot be accommodated under section 12(2)(f). It has to be an application in terms of Rule 27 of the Court of Appeal Rules. There is no such application.
- [21] Granting an application for extension of time is at the discretion of the Court. The factors to be considered by a court in such an application were set out by the Supreme Court in **NLTB v. Ahmed Khan and Anor** (unreported CBV2 of 2013; 15 March 2013). The necessary matters for consideration are (a) the length of the delay, (b) the reasons 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?

- [22] Even if the amended summons is considered as an application for extension of time, it does not satisfy the requirements for granting of extension of time as nothing has been said about the delay, reasons for the delay have not been set out and the supporting affidavit which purported to correct the earlier affidavit has set out the merits regarding the application for leave which are not likely to succeed. Since the matter had been pending from 2011 the Respondent would be prejudiced in waiting for the outcome of the application.
- [23] The Appellant in their submissions have stated that in the event the Appellant may have erred in the application of the Court of Appeal Rules, that section 17 of the Court of Appeal Act and Order 22 of the Court of Rules are invoked by the Appellant.
- [24] This submission is an admission that the Appellant has erred in complying with the Rules and is seeking the indulgence of Court to exercise its discretionary powers to rectify the errors. In the submission what is prayed for is an order in terms of the summons. The order sought in the amended summons is for the grant of leave to appeal against the decision of Justice Inoke dated 31<sup>st</sup> August 2011.
- [25] The Appellant is thus still seeking leave to appeal without seeking an extension of time and therefore the application cannot be considered as an application for extension of time even to grant the benefit in terms of Section 17 and Rule 22 of the Court of Appeal Act.

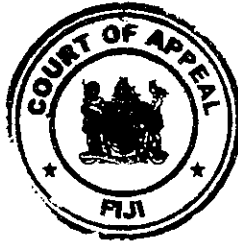
[26] In the above circumstances it is clear that the application of the Appellant is misconceived and defective.


[27] The application of the Appellant is dismissed and the Appellant shall pay \$1500 as costs to the Respondent.

***Orders of Court***

Application for leave to appeal is dismissed.

The appellant shall pay \$1500 costs to the Respondent.



  
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Hon. Justice S. Chandra  
**Resident Justice of Appeal**