

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

CIVIL APPEAL NO. ABU 38 of 2019
HBC 92 of 2014

BETWEEN : **SUNIL PRASAD MISHRA**

Appellant

AND : **VINENDRA PRASAD**

Respondent

Coram : Almeida Guneratne, JA

Counsel : Ms V Kirti for Appellant
Ms A Swamy for Respondent

Date of Hearing : 1 September, 2020

Date of Ruling : 2 October, 2020

RULING

- [1] This is an application by the Appellant seeking enlargement of time to pay security for costs of appeal.

Preliminary Objection

- [2] At the hearing, Counsel for the Respondent raised a preliminary objection to the maintenance of the Appellant's application. The said objection was three fold.
- (a) That, in the Appellant's Summons seeking enlargement of time to pay security for Costs, the same has been sought under the wrong provision.
 - (b) That, the appeal is one that has been "deemed abandoned" and there being no fresh appeal filed there is no appeal for the appellant to prosecute.
 - (c) That, no proper reason has been adduced for failure to pay the security for costs in time as required by law.

- [3] The said three-fold objection raised by Respondent's Counsel has been taken in the Respondent's written submissions dated 20 August, 2019 as well.

- [4] At the commencement of the hearing Counsel for the Appellant submitted that the Appellant will rely on his affidavit dated 13 May, 2019. Counsel opted not to file any written submissions.

Consideration of the Preliminary Objection

Objection A

- [5] Appellant's summons for enlargement of time states that the application is made pursuant to Order 17 Rule 1(c) and Order 27 of the Court of Appeal Act ('Act').
- [6] While there is no Rule 1 (c) in the present Act, I am prepared to regard the references to Order 17 and Order 27 are really references to Section 17 and Section 27 of the Act,

wrongly referenced as “Orders”. However, reading the reference to Order 27 as Section 27, I find that, Section 27 in the Act has application and/or relevance to criminal matters.

[7] In the result I proceeded to determine whether that wrong description of Section 17 as Order 17 ought to be held as a reason to uphold the preliminary objection.

[8] I do not say that the Respondent was not entitled to take that objection. However, to my mind it is anything but a pure technical objection.

Courts of Justice as different to Academies of Law

[9] I was inclined to go on the criterion of prejudice caused or not by that incorrect reference to Section 17 (describing it as Order 17) and I hold that no prejudice has been caused to the Respondent on that score. This is a Court of Justice and not an academy of law.

[10] I felt fortified in saying so having regard to the legislative philosophy reflected in Section 6 of the Act which takes into its fold Order 2 Rule 1(1) of the High Court.

[11] For the aforesaid reasons I overrule the said preliminary objection.

Objection (b)

[12] In that regard I have expressed certain reservations in some rulings made during this session. (see Maria Vani Marieta Vunisa v. Emosi and Ors, ABU 20 of 2020, 3 September, 2020 and Sun (Fiji) News v. Kewal Chand ABU 58 of 2019, 28 August, 2020).

[13] I reiterate the views expressed therein.

[14] Consequently, I was not inclined to accept the Respondent’s objection to the maintenance of this appeal and accordingly overrule the said objection as well.

Objection (c)

[15] In order to determine that issue I had necessarily to look at the respective affidavits filed on behalf of the parties.

The affidavit of the Appellant in Support of the Summons in issue

[16] The material averments in that affidavit I reproduce as follows:

- “4. THAT on 26th February 2019 Mr Ram entered appearance and obtained an order to pay security for cost of \$4,000 with 28 days.
5. THAT I was informed about the amount which we had to pay at the Fiji Court of Appeal.
6. THAT on 5th April 2019 I brought the money to have the security for cost paid in court but was advised by the court staff that we are out of time.
7. THAT the staff Mr Nitin Prakash employed by Ms Reddy and Nandan Lawyers who was in charge of my file had gone to overseas for medical reasons.
8. THAT the security of cost money had been deposited to reddy and Nandan lawyers trust account.”

[17] To begin with, the said affidavit though by the Appellant, the reason given for the lapse re: due compliance is by (Mr) Nitin Prakash employed by Messrs Reddy and Nandan Lawyers, who struck me as being a “law clerk”.

The affidavit on behalf of Respondent in opposition

[18] This affidavit is by one Munil Singh said to have been authorized by the (plaintiff) Respondent, from the very averments who struck me as a litigation clerk.

[19] No letter of authorization appears on record.

- [20] Accordingly I reject the Respondent's said affidavit in opposition on the reasoning and authorities I have taken cognizance of on the basis of a consistent *amicus curiae* of the High Court. (see: **Gulf Seafood (Fiji) Limited v. iTaukei Land Trust Board**, ABU 0079 of 2019, 28 August, 2019).
- [21] By the same token I feel compelled to reject the reason given by the Appellant at paragraph 17 of his affidavit (re-capped above).
- [22] Having said that, the failure to comply with the time limits to pay security is not explained by the Appellant's solicitors on the basis of "a mistake" on their part to come within the thinking in the Supreme Court decision in **Fiji Industries Limited v. National Union of Factory and Commercial Workers**, CBV 0008 of 2016, 27 October, 2017.
- [23] In the result, there is no reason from an acceptable source adduced on behalf of the Appellant for the said delay as to "non-compliance".
- [24] In that regard, I had on record only the written submissions of the Respondent to resolve the matter.
- [25] For the aforesaid reasons, I felt no constraint in upholding the said preliminary objection (c).

Justice and the requirements of the Law

- [26] Several considerations or principles I took into consideration in going beyond what I have said in the context of the said objection (c) to see whether there was room to grant the Appellant's summons in the interests of justice, overlooking all other aspects in the matter going on Section 17 of the Act.

[27] In that regard I looked to see whether I could have extracted some basis where the Appellant could have some reasonable prospect of success if I were to grant leave in terms of his summons.

[28] In that respect, I looked at the written submissions dated 20th August, 2020 of the Respondent which I thought would be appropriate to reproduce as follows:

“Background

4. *The Plaintiff/Respondent had filed a writ of summons against the Defendant/Appellant on the 9th day of June, 2014 seeking judgment in the sum of \$69,800.00 with interests and costs.*
5. *The claim arose out of a written agreement made on 17th July, 2009 between the Plaintiff/Respondent wherein it was agreed that the Defendant/Appellant would purchase 4 vehicles registration numbers FE 434, EU086, EN 024 and FF 754 from the Plaintiff/Appellant had made a deposit in the sum of \$19,200.00 sometime in July, 2009.*
6. *The Defendant/Appellant had then defaulted in the payment of the balance sum of \$69,800.00 and upon demand by the Plaintiff/Respondent to pay the same, the Defendant/Respondent refused to make the payments.*
7. *That the Plaintiff/Respondent had then filed a writ of summons on the 9th day of June 2014 against the Defendant/Appellant seeking judgment against the Defendant/Appellant in the sum of \$69,800.00 and the same was served on the 30th of June, 2014 and an Affidavit of Service for the same was filed on the 30th of July, 2014.*
8. *The Defendant/Appellant had neither filed an acknowledgment of service nor had the file a statement of defence and as such default judgment was entered against the Defendant/Appellant on the 3rd day of December, 2014.*
9. *That the Defendant /Appellant had then on 7th August, 2015 filed a Notice of Appointment of Solicitors and a summons of affidavit in support to set aside default judgment under Order 19 Rule 9. This application was made after a lapse of 8 months after default judgment was entered.*
10. *That the then Master of the High Court Justice Nanayakkara had dismissed the Defendant's/Appellant's application of setting aside default judgment on the technical ground that the application ought to have been made under Order 13 Rule 10 and not under Order 19 Rule 9 since no acknowledgment of service was filed.*

11. *That the Defendant/Appellant had then made an application to appeal the Master's decision and Justice Ajmeer had dismissed the Defendant's /Appellant's application to set aside and the Default Judgment entered on the 3rd day of December, 2014 to stand.*
12. *That thereafter the Defendant had filed the Notice and Grounds of Appeal on the 18th day of January, 2019 ad summons to fix security for costs was filed on the 19th day of February, 2019.*
13. *That on 26th day of February, 2019 the Defendant / Appellant was ordered to pay security for costs in the sum of \$4,000.00 within 28 days which he failed to pay due to his own inadvertence and/or the inadvertence of his Counsel."*

[29] As I have noted earlier, the Appellant opted not to file any written submissions to counter the Respondent's said submissions.

[30] In the result, the conduct on the part of the Appellant stands as an admonition of his said conduct.

Determination and Conclusion

[31] For the aforesaid reasons I was not inclined to grant the Appellant's application and accordingly proceed to make my orders as follows:

Orders of Court

1. *The application of the Appellant seeking leave to appeal and extension of time to pay security of costs for the appeal is refused and accordingly dismissed.*
2. *In all the facts and circumstances of this case, I make no order as to costs.*



A handwritten signature in blue ink, which appears to read "Almeida Guneratne".

Almeida Guneratne
JUSTICE OF APPEAL