

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0010 of 2021
[Family High Court Lautoka Action No: 04/20]

BETWEEN : 1. **SHAREEN LATA HANS**
2. **JERRYSON INVESTMENT (FIJI) PTE LIMITED**

Appellants

AND : **MAHENDRA DEO**

Respondent

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Mr D Nair for the Appellants**
Mr R. Vananalagi for the Respondent

Date of Hearing : **21st April, 2023**

Date of Decision : **2nd June, 2023**

DECISION

[1] In this application, ‘*the Appellants*’ have sought leave to appeal from the Order dated 22nd January, 2021 of the (family) High Court in Appeal. By that order the High Court dismissed an appeal by the Appellants against the decision of the Magistrate’s Court by

which decision the Magistrate's Court joined the 2nd Appellant as a party to the proceedings.

The impugned Order of the High Court

[2] The High Court dismissed the Appellants' appeal in upholding a preliminary objection raised on behalf of the Respondent that Rule 11 of the Family Court (Law) Rules had not been complied with by the Appellants.

[3] "Rule 11: *An appeal under the Act shall be instituted by filing a notice of appeal in accordance with form 26 in the Court appealed from within –*
(a) one month after the day on which the order appealed from was made
or
(b) such further time as that Court orders."

[4] As the impugned order of the High Court itself reveals, the decision of the Magistrate's Court being dated 15th October, 2019 and the Notice of Appeal against it being dated 8th November, 2019 it was well within the one month mandated by Rule 11(a).

[5] However, the filing fees had been paid only on the 21st of November, 2019 for which reason, the Registry issued the Notice of Appeal on the 21st November.

[6] Thus, the basis on which the High Court upheld the preliminary objection, that the Notice of Appeal was out of time (it being due on 14th November, 2019).

[7] Having reasoned thus, the learned High Court Judge, noting as he did that an extension of time to appeal was also not sought, concluded that, the preliminary objection was entitled to succeed and dismissed the appeal.

[8] I shall have on hold my views thereon which I will address in my final determination in this application until I deal with what transpired at the hearing of the present application.

Respondent's submissions

[9] At the outset of the hearing before me, the Respondent (in effect seeking a right of pre-audience) raised three preliminary objections to the maintenance of the present application.

The 1st "preliminary objection"

[10] Learned Counsel argued that, the 1st Appellant's present application supported by his affidavit in deposing that she is "*authorized by the 2nd Appellant to depose on this affidavit on behalf of the Appellants,*" is inadmissible evidence for the reason that, "*the 1st Appellant's affidavit does not disclose an authority in writing _ _ _*"

Determination on the said objection

[11] The Appellants were joined as parties in the Magistrate's Court. They remained so in the appeal before the High Court and now before this Court as joint appellants (appellants).

[12] Consequently, the authorities learned Counsel for the Respondent relied on in his submissions stand distinguished. Accordingly, I reject the said "preliminary objection."

The 2nd Preliminary Objection

[13] Basing his contention on Section 3(4) of the Court of Appeal Act (the Act), the twin criteria of "*final judgments of the High Court in the exercise of the appellate jurisdiction*" and on "*question of law only*" envisaged therein learned Counsel argued that, (taking the said criteria cumulatively), the impugned High Court order did not have the effect of finally determining the Appellants rights of appeal.

[14] Having given mind to the very precedents the Respondent’s Counsel adverted to and inter alia the principles laid down in **White v Brunton** [1984] QB 570 and **Gounder v Minister of Health** [2008] FJCA 40 (also re-iterating my own single judge thinking in **Orisi Vukinavanua v. Ilaisa Vunamotu & Others** [ABU0003/2020, 29th May, 2020 (among other Rulings of mine), I hold the view that, when the High Court “*dismissed*” the Appellants appeal, the rights as between the Appellants and the Respondent in the suit stood determined finally. It was “*a final judgment*” and ipso facto raised “*a question of law.*”

[15] For the aforesaid reasons I overrule the second preliminary objection as well.

The 3rd Preliminary objection

[16] This objection was based on the criteria of substantial injustice/exceptional circumstances.

[17] That objection was, in my view, hinged to the first two objections which Counsel raised.

[18] Having overruled the said objections, it follows from the reasoning given above on them that, the third objection was not entitled to succeed by itself for the merits of the leave to appeal objection needed to be considered.

Turning to consider the principles on Leave to Appeal

[19] Consequently, having overruled the three preliminary objections I now turn to the merits of the substantive application as to whether leave to appeal ought to be granted or not.

[20] Having perused the grounds of appeal urged by the Appellant and the exceptions taken thereto by the Respondent in his written (and oral submissions, while taking cognizance

of the Appellants' written submissions as well as the oral submissions), I proceed to make a determination.

The ensuing Discussion and Determination

[21] I have referred to the terms of Rule 11 of the family (High) Court Rules in paragraph [3] above.

[22] To begin with, the Rule does not require to “*pay fees*” for the “**filing of the notice of appeal**” contemporaneously.

The Impact of the relevant Magistrate's Court Rules (1945)

[23] Rule 6 read with Rule 5(2) of the said Rules require all fees under the Family Law Act to be paid by the party at whose instance it is incurred.

[24] It is to be noted that, there is no mention of either in Rule 11 of the Family (High) Court Rules or in the Magistrate's Court Rules referred to above, as to the consequences to follow for failure to pay the fees contemporaneously when filing a Notice of Appeal.

[25] Was there substantive compliance in filing the Notice of Appeal in time or was there a strict compliance to pay the fees required to be paid along with the filing of the Notice of Appeal?

[26] The High Court did not address that question in its impugned order and that I consider as a question of law this Court under Section 20(1) of (the Court of Appeal Act) is obliged to grant leave to appeal to the full Court to make a final determination on.

[27] Consequently, I make my orders as follows.

Orders:

- 1) *Leave to appeal the Order dated 22nd January, 2021 of the High Court is allowed (on the basis of reasons adduced at paragraphs [23] to [27] of this Decision.*

- 2) *Given the intricate matters of interpretation of statutes involved and the orders given in the Magistrate's Court and the High Court both being in favour of the Respondent, I make no order as to costs and costs shall await the final determination of this appeal by the final Court.*



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

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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Sairav Law for the Appellants

Vananalagi & Associates for the Respondent