

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 94 of 2006

BETWEEN : ALI'S CIVIL ENGINEERING LIMITED
FIRST PLAINTIFF

AND : VITIANA TIMBERS (FIJI) LIMITED
SECOND DEFENDANT

AND : HABIB BANK LIMITED
FIRST DEFENDANT

AND : CHALLENGE ENGINEERING LIMITED
SECOND DEFENDANT

AND : NATIONAL BANK OF FIJI T/A COLONIAL NATIONAL BANK
THIRD DEFENDANT

AND : DIRECTOR OF LANDS AND SURVEYOR GENERAL
FOURTH DEFENDANT

AND : REGISTRAR OF TITLES
FIFTH DEFENDANT

AND : ATTORNEY GENERAL OF FIJI
SIXTH DEFENDANT

BEFORE : Justice G. Deepthi Amaratunga

**COUNSEL : Ms. B. Narayan for the 1st Defendant – Appellant
Mr. V. Prasad for the Plaintiff – Respondent
Mr. P. Sharma for 2nd Defendant - Respondent**

Date of Hearing : 30th October, 2013.

Date of Ruling: 8th November, 2013

RULING

A. INTRODUCTION

1. The Plaintiff-1st Respondent (the Respondent) filed a summons seeking dismissal of the 1st Defendant-Appellant's (the Appellant) summons seeking leave to appeal as it was filed under the High Court Rules instead of Court of Appeal Act. The Appellant now seeks the court to consider the defective summons as an irregularity in terms of Order 2 rule 1 of the High Court Rules. The High Court Rules of 1988 cannot cure a patent defect in the said summons.

B. ANALYSIS

2. The Plaintiff sought judgment on admission and the hearing was conducted and the decision was delivered in favour of the Respondent. The said decision was delivered by the judge in chamber and not as the Master, but the Appellant had filed the summons seeking leave of the court in terms of the High Court Rules instead of Court of Appeal Act. This leave to appeal was made pursuant to Order 59 rule 8(2) and Order 59 rule 11.

3. An application for leave to appeal the interlocutory decision of a Judge of the High Court has to be brought by the intending appellant under the provisions of the Court of Appeal Act (Cap 12). The relevant sections are:

**‘CHAPTER 12
COURT OF APPEAL**

PART 111 – APPEALS IN CIVIL CASES

Appeals in civil cases

12.-(1) Subject to the provisions of subsection (2), an appeal shall lie under this Part in any cause or matter, not being criminal proceeding, to the Court of Appeal –

- (a) from any decision of the Supreme Court sitting first instance, including any decision of a judge in chambers;
- (b) from any decision of the Supreme Court under the provisions of the Matrimonial Causes Act; (Cap. 51.)
- (c) on any ground of appeal which involves a question of law only, from any decision of the Supreme Court in the exercise of its appellate jurisdiction under an enactment which does not prohibit a further appeal to the Court of Appeal.

(2) No appeal shall lie-

- (a) from an order allowing an extension of time for appealing from a decision;
- (b) from an order of a judge giving unconditional leave to defend an action;
- (c) from the decision of the Supreme Court or of any judge thereof where it is provided by an enactment that such decision is to be final;
- (d) from an order absolute for the dissolution or nullity of marriage in favour of any party who, having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree;
- (e) without the leave of the Court or judge making the order, from an order of the Supreme Court or any judge thereof made with the consent of the parties or as to costs only;

(f) without the leave of the judge of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court, except in the following cases, namely:-

- (i) where the liberty of the subject or the custody of the infants is concerned;
- (ii) where an injunction or the appointment of a receiver is granted or refused;
- (iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Act in respect of misfeasance or otherwise; (Cap. 247.)
- (iv) in the case of a decree nisi in a matrimonial cause or judgment or order in an Admiralty action determining liability;
- (v) in such other case as may be prescribed by rules of Court.

(3)

[Emphasis Added]

- 4. This summons as well as subsequent summons for interim stay was first dealt by Justice Balapatabendi and an interim stay of the said judgment was granted subject to certain conditions suggested by the Respondent and subsequently, the matter was fixed for hearing before Justice K. Kumar .The matter was referred to me for hearing, on the basis that that leave to appeal and stay of the execution is generally dealt by the judge who made the decision.
- 5. When this matter came up before me, the Respondent had also filed a summons seeking dismissal of the Appellant's summons since the summons was filed under High Court Rules instead of Court of Appeal Rules. The Appellant admit that its summons were filed under the wrong provision of the law, but state that it can be cured in terms of the Order 2 rule 2 of the High Court Rules of 1988.
- 6. The Plaintiff contends that since their summons was accepted by the registry it should stand. This argument cannot hold water. The acceptance or even rejection by the registry

is not a factor to be taken in to consideration as regard to issues relating to non-compliance. The Supreme Court Practice of UK (White Book) is clear on this point. Supreme Court Practice 1997 at paragraph 59/1/9

*“It needs to be emphasized, however, that these procedures for vetting appeals and applications are intended to assist the Court in the management of its caseload and to ensure, so far as possible, that invalid appeals or applications are not accepted. They do not, however, relieve any party (whether represented or acting in person) of the obligation to comply with the requirements of all relevant rules and directions and **that party’s solicitor, or the party himself/herself, as the case may be, will remain solely responsible for all consequences, including the costs, of any failure to comply with an relevant requirement.** It follows that the acceptance of an appeal or application by the Civil Appeals Office (even after legal scrutiny) does not provide any guarantee that it is valid and it remains open to any other party, and the Court of its own motion, if it thinks fit, to raise any jurisdictional issue or any failure to comply with any relevant rule or direction (see para. (5) of the Registrar’s Practice Statement of October 24, 1990 (Practice Statement (Civil Appeals: Setting Down) [1990] 1 W.L.R 1436; [1990] 3 All E.R. 981).”*

[Emphasis Added]

7. If the summons is defective the court on its own motion can dismiss it, after hearing the parties. The acceptance of any document by the registry is an administrative issue and would not fetter the judicial determination on the defects and, or irregularities. The responsibility of compliance is squarely and fairly with the party’s solicitor.
8. Mr. P. Sharma who associated with the submissions of the Appellant in his written submission relied on Rule 64 of the Court of Appeal. This cannot be applied to the present scenario. The reference to ‘court’ and ‘judge’ in Rule 64 are clear reference to Fiji Court of Appeal and judge of Court of Appeal respectively. This is evident from the direction in the said provision which refers to registrar of the court of appeal, in pursuant to any order made under Rule 64 of the Court of Appeal Rules. The ratio of the Fiji Court of Appeal decision cited in his submission again has no relevance to the issue before me. (i.e **Suresh Sushil Chandra Charan et al vs Suva City Council** Civil Appeal No. 58 of 1992 decided on 4th August, 1993 - Unreported).

9. The summons seeking the leave to appeal should have been filed in terms of the Court of Appeal Act and Order 2 rule 2 of High Court Rules of 1988 cannot cure such a patent defect. The Appellant was unable to substantiate their contention by case law. The cases cited in the written submission are where the parties had filed summons under the Court of Appeal Act where some irregularity persisted. These decisions cannot support the Appellant who had sought leave to appeal in terms of the High Court Order 59 instead of Court of Appeal Act. Since the summons was filed under the High Court Rules, it is a patent defect. Despite the irregularity the Appellant did not make an effort to correct its defective summons, even after fully aware of it , but sought refuge under Order 2 rule 2 of High Court Rules of 1988.

C. CONCLUSION

10. The leave to appeal was filed under High Court Rules of 1988 instead of Court of Appeal Act. Such a patent defect cannot be cured under High Court Rules even with the consent of the parties. The summons seeking leave to appeal is dismissed. I will not award any costs considering the circumstances of the case.

D. FINAL ORDER

- a. Summons dated 4th April 2013 seeking leave to appeal struck off.
- b. No costs.

Dated at **Suva** this **8th** day of **November, 2013**.

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Justice Deepthi Amaratunga
High Court, Suva