

IN THE HIGH COURT OF FIJI

APPELLATE JURISDICTION AT LAUTOKA

Civil Action No. 11 of 2013

BETWEEN : **RAGWELL CHETTY** of Malolo, Nadi a General Manager

APPLICANT/Appellant

AND : **Trades Furniture & Joinery Ltd** a duly incorporated limited liability company having its registered office in Nadi

RESPONDENT

Appearances : Mr Sharma J the **Plaintiff**
Mr Doton for the **Respondent**

Judgement

1.0 **Background**

- 1.1 This is an application for extention and/or enlargement of time to appeal and stay of execution filed on 4th June 2013 against a Judgement of the Nadi Magistrate Court.
- 1.2 In the Judgement of the Magistrate Court the Learned Magistrate held as follows;
- i. Declaration that the said Vehicle registration number EW 677 is the Property of the Plaintiff Company.
 - ii. That the Defendant forthwith and no later than 14 days from date of this Order at is own costs execute all the deeds and or documents necessary and do everything required to transfer the Vehicle to the Plaintiff.
 - iii. Although the Plaintiff has not been able to provide necessary documents due to fire and flood to substantiate the loss suffered, the Court exercise its discretion and

awards damages to the Plaintiff for the sum of \$20,000.00.

iv. Summarily assessed costs of \$2,500.00 in favour of the Plaintiff.

1.3 It is admitted by the Applicant that there has been a delay of some 8 months, in the filing of the current application.

2.0 **The Law**

2.1 The order xxxvii of the Magistrates Court Rules states that the Notice of Intention to appeal be filed within seven days and the grounds of appeal within one month from the date of the decision.

2.2 Order xxxvii of Rule 3(4) states that an appellant failing to file the grounds of appeal within the prescribed time shall be deemed to have abandoned the appeal, unless the Court below or the appellate court shall see fit to extend the time.

2.3 It is clear from the above Rule 3(4) that the discretion is with the appellate court to extend the time to lodge an appeal when it is not filed within the prescribed period.

2.4 The factors the Court should take into account in exercising the said discretion to grant an extension of time to lodge an appeal is stated in the Judgement of **Norwich and Peterborough Building Society v Steel [1991] 2 ALL ER 880** as follows

"In deciding whether to grant an extension of time the Court would take into account the length of and the reasons for the delay, the chances of the appeal succeeding if the application was granted and the degree of prejudice to the respondent if the application is granted"

Citing the above judgement these factors were considered in **1st Deo Maharaj Vs Burns Philip (South Seas) Company Limited FCA Civil Appeal 51/94** in a similar application.

3.0 **Analysis and Determination**

3.1 In view of the guidelines set out in the above authorities, I will now consider the application of the applicant to see whether I should exercise my discretion to grant leave to appeal out of time.

3.2 **Length of The Delay and the Reasons to It**

It is admitted by the Applicant that there is a delay of some 8 months in making this application. In the supporting affidavit of the application he has deposed inter alia that ;

- i) The applicant was previously represented by Messrs Koyas in Nadi Magistrate Court and the applicant instructed them to appeal on the decision of the Honourable Magistrate.
- ii) That he made a part payment of \$200.00 to them on the 10th of September 2012 and further \$200.00 on 29th of November 2012, copies of receipts attached marked "R-2".
- iii) That he was assured by his Solicitors that they will do the needful and contact them if they needed any further instructions from him.
- iv) Sometimes in March 2013 he was served with a judgement Debtor Summons by the Plaintiff solicitors.
- v) In spite of applicant going to his Solicitors office a few times he could not see any of the solicitors.
- vi) Thereafter, the applicant instructed Messrs Janend Sharma Lawyers to take conduct of the matter on his behalf and Janend Sharma Lawyers wrote to Koyas on the 16th April 2013 asking for update on the appeal and that there was no response to it.
- vii) The applicants current Solicitors carried out inquiries with the High Court and the Nadi Magistrate Court Registries and it appeared that an Appeal has not been filed on his behalf by his previous solicitors.

3.3 In considering the facts deposed by the applicant in his affidavit it is evident that the main contention of the applicant is that he be not deprived of this appeal due to mistake on part of his former Solicitors.

3.4 From the receipts produced marked "R-2" it is evident that the applicant has paid an advance payment to lodge an appeal. Furthermore, the former Solicitors not responding to the present Solicitors letter marked "R-4" proves that there has been a lapse on the part of the former Solicitors in not filing an appeal.

3.5 However, it is my view that the applicant ought to have followed up his Solicitors on the status of the appeal instead of waiting for

several months till he received the judgement Debtor Summons. As he has failed to do so I hold that he is also negligent in litigating his case and therefore the length of the delay is inexcusable.

4.0 **The Chance of Succeeding if time for appealing is extended**

4.1 The onus is on the applicant to establish that there is an arguable ground and chances of appeal succeeding if the application for leave to appeal out of time is granted.

4.2 In **Avery Vs No. 2 Public Service Appeal Board and Others [1973] 2 NXLR 86** it was said;

"The onus is on the intending appellant to satisfy the Court that in all the circumstances the justice of the case requires that he be given leave"

4.3 It is contended by the Learned Counsel for the Applicant that the Learned Magistrate erred in law and in fact in awarding \$20,000 as Damages when there was no documentary or other evidence of any loss suffered by the Respondent (Plaintiff). He submitted that there was no evidence led at the trial to show that the Respondent was entitled to \$20,000 in damages and the Learned Magistrate gives no reasons or explanation for awarding \$20,000.00 in damages.

4.4 The Learned Magistrate has held that;

"although the Plaintiff has not been able to provide necessary documents due to fire and flood to substantiate the loss suffered, the court exercises its discretion and awards damages to the Plaintiff for the sum of \$20,000.00"

4.5 The Learned magistrate has not stated in his judgement how he arrived at the quantum of the award. The applicant has a right to know why he is asked to pay \$20,000.00 to the respondent. No where in the judgement I find any reasons for awarding a sum of \$20,000.00. The Learned Magistrate states that no documents were provided by the Respondent due to the fire and flood to substantiate the loss suffered. Even if the Respondents documents were destroyed due to fire and flood the onus is on him to substantiate the loss suffered. The discretion of Court cannot be used in arbitrary manner to award damages without any evidence being adduced in support of the claim and without giving the reasons for the award.

- 4.6 **In Registrar of Titles V Prasad [2001] FJCA 5; ABU 000 9D 2001 S (8 June 2001)** where the Appellants were 12 months out of time and the reasons given for the delay was a mistake on the part of a legal advisor which was held to be inexcusable, Madam Justice Shameem as a single Court of Appeal Judge stated that

"However, I accept the submissions of counsel for the Appellant that the appeal is not necessarily doomed to failure, and that he has at least an arguable case that the commercial loss to the Respondent, calculated on the basis of the improved value of the land, should not have been awarded to him....."

- 4.7 In considering the above facts and the guidelines set out by the authorities I am of the view that the applicant has an arguable case with a good prospect of success opposed to it being a frivolous and vexatious.

5.0 **Prejudice to the Parties**

- 5.1 The Respondent has filed Judgement debtor summons 8 months after the judgement. The Respondents, in their opposing affidavit does not depose that any prejudice that they will suffer as a result of extension of time to appeal or leave being granted to appeal out of time. On the other hand, I am of the view that the Applicant will suffer grave injustice if he is not permitted to appeal.

6.0 **Application for Stay**

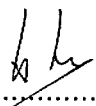
- 6.1 The Applicant in his motion is seeking a stay of execution of the judgement dated 8th August 2013. The Learned Council for the respondent submits that there is no such order dated 8th August 2012. She submits further as the Ruling is dated 8th July 2012 Order sought by the Applicant ought to be struck out and dismissed with costs as the application is defective.
- 6.2 Mr Sharma, Learned Counsel for the Applicant submitted that there is a interim stay by consent in the Magistrate Court and therefore he is reserving the right to make submissions on the application for stay later.
- 6.3 As there is a interim stay already in place, I will not make any order on the stay application in this judgement. The parties are at liberty to argue on the issue of a stay at the appropriate stage in these proceedings.

7.0 **Conclusion**

7.1 Having considered all of the above, I conclude that leave to appeal out of time should be allowed. Accordingly, I make the following orders:

Orders

- i) The application for leave to appeal out of time is allowed.
- ii) The notice of appeal is to be filed within seven days from today.
- ii) Costs of this application shall be costs in the appeal.


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Lal S. Abeygunaratne
Judge
29/10/2014

