

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 112 of 2014

BETWEEN : ONE HUNDRED SANDS LIMITED

PLAINTIFF

AND : TE ARAWA LIMITED

DEFENDANT

Before : The Honorable Mr Justice David Alfred

Counsel : Mr D Sharma for the Plaintiff
Mr W Clarke for the Defendant

Date of Hearing: 24 June 2015

Date of Interlocutory Judgment: 30 June 2015

INTERLOCUTORY JUDGMENT

1. This an Application by the Plaintiff for the Striking Out of the Defendant's Summons for Leave to Appeal against the Interlocutory Order of the Master of the High Court made on 20 February 2015 (the Order) and for costs. The Application was made pursuant to Order 2 rule 2(1) and (2) and Order 59 rule 11 of the Rules of the High Court (the Rules).

Factual Background

2. The Defendant had filed a Summons on 9 July 2014 seeking the following Orders:
 - (i) *A stay of the entire proceedings in this action including the Plaintiff's summons for summary judgment.*
 - (ii) *That the said Summons be determined first before the hearing of the Plaintiff's application for summary judgment.*
3. The Summons was dismissed by the Master by the Order.
4. The Summons for leave to appeal against the Order was filed on 6 March 2015 at 2.50pm. It was served on the Plaintiff's solicitors on 19 March 2015.
5. Under Order 59 rule 11 of the Rules, the application for leave to appeal shall be filed and served within 14 days of the delivery of the Order.
6. It is not disputed by the parties that the last day for filing and serving the aforesaid application was 6 March 2015.
7. The matter came up for hearing before me on 24 June 2015.
8. At the hearing, Counsel for the Plaintiff submitted as follows:
 - (a) There was no application by the Defendant, before the Court, for an extension of time, in accordance with Order 59 rule 10(1) of the Rules;
 - (b) The Court should not apply its inherent jurisdiction;
 - (c) The Affidavit of the Defendant's Solicitors' Litigation Clerk, Leighton Turner, (the Affidavit) sworn on 29 May 2015 confirmed that the Summons was filed on the last day of the requisite period for its filing i.e. on 6 March 2015;

- (d) As there was no competent application before the Court, the Summons should be struck out with costs.
9. Counsel for the Defendant then submitted as follows:
- (a) The key facts were not disputed *viz* that the application was filed on 6 March 2015 and served on 19 March 2015;
 - (b) The Court should not blindly follow Order 59 rule 11 of the Rules;
 - (c) The Court had a discretion. If the application was filed in time the Court must consider the circumstances. It should not look at Order 59 rule 10 of the Rules;
 - (d) It can be seen that the Affidavit did not provide any material explaining the delay. However, the Court can enlarge time under Order 3 of the Rules, as Courts do so in the exercise of their discretion;
 - (e) Here the application was filed in time, so the delay of 13 days in its service was not significant;
 - (f) Finally, there was no requirement here to file an application for extension of time within the specified period unlike under the Court of Appeal Rules.
10. In his reply, Plaintiff's Counsel said there was no material in the Affidavit giving the reason for the delay.
11. In the course of their submissions, both Counsels cited cases, which I set out below, which I have considered in reaching my decision.
12. The cases cited are:
- (a) For the Plaintiff:
 - (i) ***Habib Bank Ltd vs. Mehboob Raza and Others*** – *Suva High Court Civil Action HBC 53 of 2005*;

(b) For the Defendant:

- (i) **Ramesh Patel & Devanesh Prakash Sharma Trading as R Patel Lawyers vs. Rajni Kant** - Suva High Court Civil Action No. HBC 16 of 2011;
- (ii) **Alspec Holdings Ltd vs. Ministry of Agriculture, Fisheries and Forests and the Attorney General of the Republic of the Fiji Islands**, - Suva High Court Civil Action No. HBC 354 of 2010.

13. I have also perused the Defendant's Solicitors' written opposing submissions provided at the conclusion of the hearing.
14. At the conclusion of the hearing, I reserved Judgment.
15. I now proceed to deliver my Judgment.
16. The nub of the matter is whether it is fatal to the Defendant that its Summons was not served within the 14 days specified in Order 59 rule 11 of the Rules.
17. Here I will refer to the decision of the Privy Council in: **Ratnam vs. Cumarasamy and Another**: [1964] 3 All E.R. at page 935;
Lord Guest in giving the opinion of the Board to the Head of Malaysia said, inter alia:

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that

he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle.”

18. I am of opinion, that litigants and their legal representatives must not think that they can invoke the inherent jurisdiction of the court like a magic wand to waive away the consequences of their omission to comply with the Rules.
19. If the Privy Council considered the lame excuse of the lay appellant in **Ratnam vs. Kumarasamy** did not constitute material on which to exercise their discretion in favour of the appellant, how much more must I find here that the Defendant's solicitors have failed to even provide any explanation to constitute material on which I can exercise my discretion in favour of the Defendant.
20. No reason whatsoever was provided for the delay in waiting until the eleventh hour on the last day for filing the summons thus effectively and unilaterally precluding any possibility for the summons to be issued and then served on the Plaintiff in time.
21. The Affidavit is long on what happened after the expiry of the period on 6 March 2015 and short on what transpired before 6 March 2015. The Affidavit is conspicuously deficient in affording any or any plausible reason for me to consider in arriving at a decision on whether or not to allow an extension of time.

22. In these circumstances, I consider that the Defendant in failing to serve the summons before 6 March 2015 has failed to comply with the requirement of filing and serving the summons within the 14 days period specified by Order 59 rule 11.
23. I therefore allow the Plaintiff's Summons and hereby dismiss the Defendant's Summons for leave, with costs which I summarily assess at \$500.00 to be paid to the Plaintiff.

Delivered at Suva this 30 day of June 2015.




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David Alfred
JUDGE