

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBC 135 of 2014**

**BETWEEN** : **RESINA NAFRUE MERUTU KATAFONO** of 6 Storck Street,  
Nasese, Suva, Fiji.

**APPLICANT**

**AND** : **KENNETH RICHARD BROWN** of Flat 2, Waimanu Road,  
Suva, Fiji, Finance.

**RESPONDENT**

**BEFORE** : **His Lordship Hon. Justice Kamal Kumar**

**COUNSELS** : Ms L. Vaurasi for the Applicant  
Mr G. O'Driscoll for the Respondent

**DATE OF RULING** : 14 January 2016

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**RULING**

**(Application For Leave To Extend Time To  
File Notice Of Intention To Appeal)**

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## **1.0 Introduction**

1.1 On 20 May 2014, the Applicant filed an Application by Summons seeking following Orders:

“(i) ***THAT*** time be extended to allow the Applicant to file Notice of Intention to Appeal out of time against the decision of the Suva Magistrates Court in Civil Action Number 116 of 2012 dated 14<sup>th</sup> of February 2014;

(ii) ***THAT*** time be extended to allow the Applicant to file the Grounds of Appeal out of time against the decision of the Suva Magistrate Court in Civil Action Number 112 of 2012 dated the 14<sup>th</sup> of February 2014;

(iii) ***THAT*** costs be costs in the cause.”

***(“the Application”)***

1.2 It should be noted that Suva Magistrates Civil Action number should read 116 of 2012 and not 112 of 2012.

1.3 On 27 June 2014 being the returnable date of the Application, Respondent’s Counsel raised preliminary issue that once time to give notice of intention to appeal has expired the Magistrates Court or High Court has no jurisdiction to extend time for filing of notice of intention to appeal.

1.4 Both parties were then directed to file submission on the preliminary issue with ruling to be delivered on notice.

1.5 On 14 July 2014 Applicant’s Solicitors filed an Application for extension of time to file submissions.

1.6 On 22 July 2014 the time for filing of Applicant’s submission and Reply to Applicant’s submission was extended until 1<sup>st</sup> August 2014.

## **2.0 Preliminary Issue**

2.1 The preliminary issue that is to be determined by this Court is whether the Magistrates Court or this Court has jurisdiction to deal with application to extend time to file Notice of Intention to Appeal if the Appellant fails to file Notice of Intention to Appeal within seven (7) days after the decision was given pursuant to Order 37 Rule 1 of the Magistrate Court Rules.

2.2 It is sad to note that the confusion brought about this issue is because of judicial pronouncement as a result of decision in **Crest Chicken Limited v. Central Enterprises Limited** (2005) FJHC 87, HBBA 13J 2003 (19 April 2005) (Pathik J).

2.3 I think it is appropriate to refer to some of the cases that dealt with the issue.

2.4 Order 37 Rule 1 of the Magistrate Court Rules provide:-

***“1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called “the court below”) notice in writing of his intention to appeal:***

***Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.”***

2.5 In **Crest Chicken** (supra) his Lordship Justice Pathik (as he then was) in respect to the rule stated as follows:-

***“This is a mandatory rule and it does not give the Magistrate power to extend time. Even if he had, no application was made by the appellant for extension for it was already late in filing of giving Notice of Intention to appeal within the seven days after judgment was pronounced.***

***Had the legislature intended it could have specifically provided for application to extend time. It did not do so in Or. 37 R.1 but Or. 37 R.4 which provides as follows, gave the Magistrate’s Court power to extend time to file grounds of appeal.***

***4. On the appeal failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.”***

On the “appeal failing to file” in first line of Rule 4 reads “On the appellant failing to file ...”

2.6 His Lordship further went on to state that:-

***“In Or.XXXVII r.1 there is no provision for extension of time to give Notice of Intention to Appeal, although there is power to extend to file Grounds of Appeal under Or.37 r.4.”***

2.7 His Lordship held that the Magistrates Court or High Court does not have jurisdiction to extend time for filing of Notice of Intention to Appeal.

2.8 In **Nand v. Famous Pacific Shopping (NZ) Limited** (2010) FJHC 619; Civil Appeal No. 6 of 2009 the Court dealt with the Application to extend time to file notice of intention to appeal and the grounds of appeal under Section 39 of Magistrates Court Act.

The Court in respect to application to extend time to file notice of intention to appeal stated as follows:

***“In determining whether it should exercise its discretion to allow the Appellant to file and serve a Notice of intention to appeal out of time, the court considers four matters. They are (a) the length of the delay, (b) the reasons for the delay, (c) the merits of the proposed defence and (d) any prejudice likely to result to the Respondent.”***

2.9 In **Narayan v. Kumar** (2014) FJAC 187, HBA 34.2011 (20 March 2014) his Lordship Justice Amaratunga followed the decision in **Crest Chicken**.

2.10 In **Fiji Posts and Telecommunications Ltd v. Suey Loo Keen** HBA 003 of 2000L (21 March 2014) her Ladyship Madam Justice Wati held that time to file notice of intention to appeal can be extended under Order 2 Rule 2 of the Magistrates Court Rules. Order 2 Rule 2 of Magistrates Court Rules provide as follows:-

***“Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the court for an order to effect the object sought to have obtained with the consent of the other party, and such order may be made although the application for the order is not made until the expiration of the time allowed or appointed”.***

The Court stated as follows:-

***“I find that even if there is no specific power given under the said rule which prescribes the time to file the notice of intention to appeal, there is nothing in the words of Order II Rule 2 which can preclude the Court from using that rule to consider an application for extension of time to file notice of intention to appeal provided that the applicant first makes an attempt to secure consent of the other parties for doing of the act for which the application has been made in Court. In absence of a specific provision, the Court can go to the general provision to consider the application for extension of time.”***

2.11 In **Tausere v. Clayton** [2015] FJHC 902; HBM 141.2014 (18 November 2015) the most recent decision on this issue his Lordship Justice Seneviratne followed **Crest Chicken** and held that Court does not have power to extend time to file Notice of Intention to Appeal once the time has expired.

2.12 His Lordship stated as follows:-

***“It is difficult to understand what the learned counsel meant by saying that they were within 7 days allocated by the above provisions. This cannot be an application for the enlargement of time to file notice of intention to appeal. If it is so the application must fail in limine for the reason that the Court has no power to extent the time period allocated to file notice of intention to appeal.”***

2.13 **Nands** case dealt with the application for leave to file notice of intention to appeal and grounds of appeal out of time and dealt with the application under section 39 of Magistrates Court Act.

2.14 In **Post and Telecommunication** case time for filing of notice of intention to appeal and grounds of appeal was extended pursuant to Order 2 Rule 2 of the Magistrate Court Rules.

2.15 I will now look at relevant provision of Magistrate Court Rules and Magistrate Court Act that deal with Civil appeals.

2.16 The relevant rules of Magistrates Court Rules for the purpose of the issue before this Court are Order 37 Rules 1, 3 and 4. However, I will also mention Order 37 Rule 2.

2.17 The above rule requires the appellant to do the following:-

- (i) Rule 1 requires appellant to give notice of intention to appeal in writing to Court and Respondent within seven (7) days after the date decision is given;
- (ii) Rule 2 gives Magistrates Court discretion to Order appellant to provide security for costs;
- (iii) Rule 3 requires appellant to file in Magistrates Court and serve grounds of appeal within one month from the date decision is given by Magistrates Court;
- (iv) Rule 4 states that if appellant fails to comply with Rule 3 then it shall be deemed that appellant has abandoned the appeal, unless Magistrates Court or High Court shall see fit to extend time for filing grounds of appeal.

2.18 Section 38 of Magistrates Court Act provide as follows:-

***“38. Subject to the provision of Section 39, the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates’ court or by the Supreme Court, as prescribed by rules of the Court” (emphasis added)***

2.19 Under section 38 appeal will be entertained by High Court if appellant gives notice of intention to appeal, files grounds of appeal within the prescribed time and give security for costs if ordered by Magistrates Court.

2.20 Section 39 of the Magistrates Court Act provides as follows:-

***“39. Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a magistrates’ court, on any terms which it thinks just.” (emphasis added)***

2.21 Section 39 has been used to extend time for filing of Notice of Intention to Appeal and Grounds of Appeal.

- 2.22 My view on section 39 is that it does not give power to Magistrates Court or High Court to extend time for filing of notice of intention to appeal or grounds of appeal **but** gives the High Court discretion to **“entertain any appeal from Magistrates Court, on any terms which it thinks just”** when the Appellant has failed to comply with rules of Court in relation to civil appeal.
- 2.23 For instance where the appellant files notice and grounds of appeal without giving notice of intention to appeal within the prescribed time the High Court may hear the appeal **“on terms it thinks just”**.
- 2.24 Order 2 Rule 2 of the Magistrates Court Rules that was applied in **Post and Telecommunications** case does not apply here as there is no evidence that Applicant sought consent of Respondent.
- 2.25 I note that in the cases listed at paragraphs 2.6 to 2.11 of this ruling the Counsel for the Appellants made no reference to Order 3 Rule 9 of the Magistrates Court Rules which provide as follows:

***“A court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:***

***Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction or order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the court or a judge shall otherwise order.” (emphasis added)***

- 2.26 Court is defined as **“Magistrates Court established under Magistrates Court Act”** in section 2 of the Magistrates Court Act.
- 2.27 It has to be noted that Order 3 Rule 9 does not relate to filing of any specific document or doing of any specific act as the heading for Order 3 is **“Miscellaneous Provision”**.

- 2.28 Therefore Order 3 Rule 9 is applicable to all the provision of the Magistrates Court Rules that require parties to do any act or for taking any proceedings within prescribed time.
- 2.29 Filing of Notice of Intention to Appeal within the prescribed time **is an act that is required to be done by the Appellant** and if Appellant fails to do such act then the Magistrates Court or the High Court has unfettered discretion to extend time for appellant to do such an act.
- 2.30 Finally this Court is of the view that:-
- (i) Section 39 of the Magistrates Court Act does not give this Court discretion to extend time for filing of notice of intention to appeal or grounds of appeal but gives this Court power to deal with the appeal before the Court on terms it thinks just even though appellant has not complied with rules in respect to Civil Appeal (ss38 and 39 of Magistrates Court Act);
  - (ii) This Court and Magistrates Court has jurisdiction/discretion to extend time for filing of notice of intention to appeal and grounds of appeal under Order 3 Rule 9 of the Magistrates Court Rules, even if Application to enlarge time is made after prescribed time has expired.

This view has some support from what was said in **Isikeli Maravu Tuituku & Anor. v. Isikeli Tuituki & Ors**, Family Court Appeal No. 1 of 2014 (7 December 2014) (Wati J).

- 2.31 In relation to costs, I take into consideration that preliminary issue needed to be determined because of conflicting judicial pronouncements and as such I do not think it is appropriate to make any Order for costs.

### **3.0 Declaration/Order**

- 3.1 I make following declaration and Order:-

- (i) Declare that Applicant has right to apply to Magistrates Court or the High Court to extend time for filing of Notice of Intention to Appeal and grounds of appeal even if time for filing of notice of intention to appeal has expired;



- (ii) There be no Order as to costs on the preliminary issue;
- (iii) Both parties to file and serve Submissions in respect to Application to extend time for filing of notice of intention to appeal and grounds of appeal by 25 January 2016;
- (iv) Any Reply to Submission to be filed and served by 2 February 2016;
- (v) There be interim Stay of execution of decision delivered on 14 February 2014 by Suva Magistrates Court in Civil Action No. 116 of 2012 until further Order of this Court;
- (vi) This matter be adjourned to 5 February 2016 at 9.30am for mention only.



.....  
K. Kumar  
**JUDGE**

At Suva  
14 January 2016

**Shekinah Law for Applicant**  
**Messrs. O'Driscoll & Company for Respondent**