

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Suva High Court Appeal No. 05 of 2014
Suva Magistrates Civil Case No. 232 of 2012

IN THE MATTER of an appeal from the
decision of the Magistrates Court in Civil Action
191 of 2009

BETWEEN : **NARAYAN CHIN SAMI**
APPELLANT

AND : **PACIFIC FEEDS LIMITED**
RESPONDENT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Appellant in Person
Mr. V. Maharaj for the Respondent

DATE OF JUDGMENT : 18 March 2016

JUDGMENT

1.0 Introduction

- 1.1 On 22 July 2013, Appellant filed Notice of Intention to Appeal Magistrates Court decision dated 15 July 2013, whereby the Learned Chief Magistrate struck out Appellants' Application to Appeal Out of Time Referee's decision in Small Claims Tribunal Claim No. 180 of 2012 which is wrongly stated as 1142/10 in the decision.
- 1.2 On September 2013, Appellant filed Grounds of Appeal.

- 1.3 The Appeal was first called in this Court on 11 June 2014, when Appellant failed to appear and Court directed that notice of adjourned hearing be served on the Appellant and the Appeal was adjourned to 27 June 2014.
- 1.4 On 27 June 2014, Appellant on Courts' advise sought time to seek legal advise and file Submissions when both parties were directed to file Submissions by 31 July 2014, Reply to Submission by 22 August 2014, and the appeal was adjourned to 29 August 2014 to fix hearing date.
- 1.5 On 31 July 2014, Appellant filed Submission as directed by the Court.
- 1.6 On 29 August 2014, Respondent's Counsel informed the Court that this matter would be settled and sought time to take instructions from Respondent to which the Appellant had no objection. The Appeal was adjourned to 12 September 2014.
- 1.7 On 12 September 2014, Counsel for Respondent informed Court that matter is not settled and sought fourteen (14) days to file Respondent's Submission to which Respondent objected.
- 1.8 After Court explained, to the Appellant that it will be in his interest if Submission is filed and served on him as it will give him an opportunity to seek advise and respond to Respondent's Submission. Appellant agreed that time for filing of Respondent's Submission be extended.
- 1.9 Respondent was then directed to file and serve Submission by 23 September 2014, with Appellant to file and serve Submissions in Reply by 3 October 2014 (if necessary) and this Appeal was adjourned to 6 October 2014, for hearing.
- 1.10 On 23 September 2014, and 30 September 2014, Respondent and Appellant filed Submissions and Response to Submissions respectively.
- 1.11 On 6 October 2014, the appeal was heard and at the request of the parties, was adjourned to 30 October 2014, to see if matter can be settled.
- 1.12 On 30 October 2014, parties informed Court that the matter cannot be settled and as such the Appeal was adjourned for judgment on notice.

2.0 Background Facts

- 2.1 The Appellant filed claim against the Respondent in Small Claims Tribunal, Suva being Claim No. 1142/10.
- 2.2 On 22 July 2010, the Referee made Order in favour of the Appellant.
- 2.3 Respondent appealed that order to Magistrates Court and Learned Chief Magistrate (who was then Acting Chief Magistrate) quashed the said Order. It is noted that ruling on Appeal delivered on 14 July 2011, states that date of Small Claims Tribunal Order that is quashed as 10 October 2010. This is obviously a typing error and should be read 22 July 2010.
- 2.4 Since this Appeal does not relate to SCT Claim No. 1142 of 2010, the error is not relevant to this appeal.

- 2.5 When the matter subject to SCT Claim No. 1142 of 2010 was called before Magistrate Court to hear the matter as ordered by the Learned Chief Magistrate the Appellant withdrew his claim.
- 2.6 Subsequently Respondent filed claim against Appellant in Small Claims Tribunal being SCT Claim No. 180 Of 2012.
- 2.7 On 9 February 2012, the Referee ordered the Appellant to pay \$4,490.00 to the Respondent.
- 2.8 On 10 May 2012, Respondent caused Judgment Debtor Summons to be filed which was first called on 25 July 2010, and thereafter adjourned to 6 September 2012, and 27 September 2012.
- 2.9 On 11 September 2012, Appellant filed Notice of Motion seeking leave to appeal out of time the Referee's decision in SCT Claim No. 180 of 2012.
- 2.10 On 8 October 2012, Appellant filed Amended Notice of Motion.
- 2.11 After hearing the parties the Learned Chief Magistrate dismissed the motion by Ruling delivered on 15 July 2013. It should be noted that the claim number stated in the Ruling is SCT Claim 1142/10 when it should read SCT Claim No. 180/12.

3.0 Appeal

Preliminary Issue

- 3.1 The Respondent submitted that:
 - (i) Appellant has failed to file and serve Notice of Intention to Appeal within the prescribed time;
 - (ii) Appellant has failed to file Grounds of Appeal within the prescribed as such the Appeal is abandoned.

Notice of Intention to Appeal

- 3.2 Order 37 Rule 1 of Magistrates Court Rules provides as follows:-

“Every appellant shall within seven days after the day of 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. (Substituted by Rules 20th November, 1946, and amended by Rules 6th November, 1995).”

- 3.3 Respondent's Counsel submits that once the prescribed time for filing of Notice of Intention of Appeal has expired this Court has no jurisdiction to deal with the application to extend time.

- 3.4 Respondent relied on **Crest Chicken Ltd v. Central Enterprises** [2005] FJHC 87; HBA0013; 2003s (19 April 2005) in support of its submission that the magistrate does not have jurisdiction to extend the time period for filing notice of intention to appeal (Justice Pathik).
- 3.5 This Court in **Katafono v. Brown** (2016) Civil Action No. HBC 135 of 2014 (14 January 2016) dealt with this issue and held that the Magistrates and High Court has jurisdiction/discretion to determine applications to extend time for filing of Notice of Intention to Appeal (“NIA”) even if application is filed after the time has expired under Order 3 Rule 9 of the High Court rules which provides 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.”**
- 3.6 Since, there is no application before this Court for extension of time to file NIA I will not deal with this issue any further.
- 3.7 In this Instance the Respondent state that the Appellant has:-
- (i) Not filed and served NIA within prescribed time;
 - (ii) NIA was served on the Respondent on or about 14 June 2014.
- 3.8 As for filing of NIA the Appellant submits that he filed NIA on 22 July 2013, which is within the prescribed time as the decision was delivered on 15 July 2013.
- 3.9 I have cited the original NIA filed in Magistrate Court and note that it was filed on 22 July 2013, which is within the prescribed time.
- 3.10 However, Order 37 Rule 1 makes it very clear that it is for the Appellant to serve NIA on the Respondent and Court. This is a mandatory requirement.
- 3.11 There is no evidence before the Court that the Respondent was served with the NIA within the prescribed time.
- 3.12 Also the fact that NIA was served on Respondent on 14 June 2014, which is ten months and three weeks after filing of NIA, the Appellant breached the mandatory requirement in Order 37 Rule 1 of the Magistrates Court Rules.

3.13 Since the Appellant has failed to serve the NIA within the prescribed time and there is no application before this Court to extend such time this court cannot deal with this Appeal and it needs to be struck out.

3.14 For sake of completeness, I think it is appropriate to deal with other issues raised by the parties.

Grounds of Appeal

3.15 Order 37 Rules 3(1) and 4 of Magistrate Court Rules provides as follows:-

“r3.-(1) The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.

r4. On the appellant 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.”

3.16 The writing on the top right hand side of the grounds of appeal filed in Magistrates Court is as follows:-

“Received on 8/8/13
 4/9/13
Date Received 4/9/13
RR No. 197047
 \$28.75”

3.17 It is apparent from the above notation that:-

- (i) Appellant must have taken the Grounds of Appeal to Magistrates Court on 8 August 2013, but was returned due to certain circumstances.
- (ii) Appellant brought back the Grounds of Appeal to Magistrates Court on 4 September 2013.

3.18 This is supported by the fact that Appellant changed the date of signing the Grounds of Appeal from 2 September 2013 to 8 August 2013 and that there are two stamps on the back page of Grounds of Appeal one with date 8 August 2013 and date on the other is not eligible but shows time as 10.20am.

3.19 Also, the back page of Grounds of Appeal filed in the Magistrate Court appears to be a photocopy.

3.20 In view of what I stated at paragraphs 3.16 to 3.19, I find that Appellant filed Grounds of Appeal on 4 September 2013 and not on 8 August 2013.

- 3.21 Therefore even if Appellant had fully complied with Order 37 Rule 1 he would not be able to proceed with this Appeal for failure to file Grounds of Appeal within the prescribed time which was 15 August 2013. Appellant was out of time by twenty (20) days.
- 3.22 Under Order 32 Rule 4 of Magistrates Court Rules this appeal was abandoned.
- 3.23 This court thinks it appropriate to consider the fact that if Appellant had complied with Order 37 Rules 1 and 3 (which he has not) would he then be able to challenge the decision of Learned Chief Magistrate.

Magistrates Court Decision

- 3.24 I note that the Learned Chief Magistrate has correctly identified the factors that need to be considered in respect to Application to extend time to appeal and they are:-

- “(i) *the length of delay*
(ii) *the reason for the delay*
(iii) *the chance of appeal succeeding if time for appealing is extended,*
(iv) *the degree of prejudice to the Respondent if the application is granted.*”

CM Van Stilleveldto v. E L Carriene Inc. [1983] 1 ALL ER 699 of 704;
Norwich and Peterborough Building Society v. Steed [1992] 2 ALLER 830 at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051 of 1994S - FCA; **Nand v. Famous Pacific Shopping (NZ) Limited** (2010) FJHC 619; Civil Appeal No. 6 of 2009.

Length of Delay

- 3.25 Even though it is not stated in the Learned Chief Magistrate’s Ruling:
- (i) The Appellant was to file his appeal in respect to SCT decision by 23 February 2012 (i.e. 14 days from 9 February 2012)
- (ii) Appellant filed original application for extension of time to file Appeal on 8 August 2012 (after lapse of five months two weeks).
- 3.26 The delay obviously is inordinate.

Reasons for Delay

- 3.27 In **Kamlesh Kumar v. State** Criminal Appeal No. CAV0001/09 and **Mesake Sinu v. State** Civil Appeal No. CAV001/10 his Lordship the Honorable Chief Justice Gates, President of the Supreme Court of Fiji stated as follows:-

***“[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.*”**

3.28 His Lordship also quoted the following from Rhodes Cr App. R 35 at 36:-

“A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.”

3.29 The Learned Chief Magistrate stated at paragraphs 4, 5 and 6 of his Ruling as follows:-

“4. In this case the judgment debtor’s sole ground of appeal is that he was never served with proceedings.

5. The judgment creditor has deposed to the fact that he attempted unsuccessfully to serve the debtor and that he later served him through posting the claim by registered mail to his address.

6. The Court is satisfied that the debtor was served and he failed to appear. He has failed to answer why he did not file the appeal in time and what his proposed grounds of appeal are.”

3.30 I have read the Affidavit in Support of Application to extend time and note that apart from what was stated by the Learned Chief Magistrate I cannot see any valid reasons given by the Appellant for late filing of Application.

Chances of Appeal Succeeding

3.31 The Learned Magistrate in his Ruling has made it very clear that there are only two grounds of appeal from SCT award or order and they are:

- (i) The referee did not have jurisdiction to make the order;
- (ii) Referee acted in an unfair manner.

3.32 Appellant needed to establish that the Referee acted unfairly towards him when the Referee dealt with his claim.

3.33 Appellant cannot challenge the merits of Referees decision even if it was legally wrong.

Sheet Metal Plumbing (Fiji) Ltd v. Deo [1999] FJHC 26; HBA0007d.99s (14 April 1999)

3.34 No evidence was provided to Magistrates Court to establish the above grounds.

4.0 Conclusion

4.1 I make the following findings:

- (i) Appellant failed to serve Notice of Intention to Appeal on the Respondent within the prescribed time and accordingly there is no appeal before this Court. Order 37 Rule 1

- (ii) Even if Appellant had complied with Order 37 Rule 1 of Magistrate Court Rules, the Appeal would be deemed to be abandoned for failure to file Grounds of Appeal within the prescribed time. Order 37 Rules 3 & 4
- (iii) Even if the Appellant had complied with Order 37 Rules 1 and 3 the Learned Chief Magistrate did not err in exercise of his discretion.


Costs

4.2 In respect to costs, I note both parties filed submissions and made oral submissions and take into consideration the nature of the proceedings.


Orders

4.3 I make following Orders:-

- (i) Appeal is dismissed and struck out;
- (ii) No order as to costs.



K. Kumar
JUDGE



At Suva

18 March 2016

Appellant in Person

MC Lawyers for the Respondent