

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO: HBC 93 OF 2013

BETWEEN : **KRITESH CHAND** of Lavusa, Nadi, Unemployed.

PLAINTIFF/RESPONDENT

A N D : **KRISHNA KUMAR NAIDU** and **SHILVA NADAN** of Lot 2, Solovi, Nadi and Chinakoti, Moto, Ba trading as **TROPIKO EXPORTS.**

1st DEFENDANTS / 1ST APPLICANT

A N D : **SHELVIN RITNESH KUMAR** of Nasau, Nadi, Driver.

2ND DEFENDANT / 2ND APPLICANT

Appearance : Mr Roopesh Singh for defendants/applicants
Mr R P Chaudhary for plaintiff/respondent

Date of Hearing : 08.09.2016

Date of Ruling : 20.10.2016

R U L I N G

Introduction

1. This is an application for enlargement of time to appeal and stay pending appeal and stay of execution of judgment pending appeal ('the application'). The application is supported by an affidavit of Krishna Kumar Naidu, the first applicant sworn on 9 August 2016. The applicant seeks the following orders:

1. **AN Order** that leave be granted to the Appellants/Original 1st Defendants to file notice of Appeal out of time against the Interlocutory Judgment of the Learned Master of the High Court delivered on the 13th day of May 2016 in refusing to set aside the default judgment entered on the 2nd August 2013.
2. **AN Order** that the execution and/or enforcement of the said Interlocutory Judgment of the Master of the High Court delivered on the 13th day of May 2016 be stayed until the determination of this application and the Appeal.
3. **AN Order** that there be a stay of execution of the default judgment obtained on the 2nd August, 2013 pending the determination of this application and the Appeal.
4. **AN Order** leave be granted to the Appellants/Original 1st Defendants to file an Appeal proper against the Interlocutory Judgment of the Learned Master of the High Court delivered on the 13th day of May 2016 in refusing to set aside the default judgment entered on the 2nd August 2013.
5. **THAT** the costs of this application be costs in the cause.
6. **ANY** further relief or orders that his Honourable Court deems just and appropriate.

2. The application is made pursuant to Order 59, Rule 10 (2) of the High Court Rules 1988 (as amended), Order 59, Rule 8 (2), Order 59, Rule 11, Order 59, Rule 16 (2) and under the inherent jurisdiction of the Court.
3. The respondent did not file any affidavit in opposition.
4. At the hearing both parties made oral submissions and they have also filed their written submissions.

The Background

5. Kritish Chand, the Plaintiff instituted this action on 27 May 2015. The defendants, Krishna Kumar Naidu and Shilva Nadan filed an acknowledgement of service on 27 June, 2013. On 01 July 2013 they wrote a letter to the Registry detailing their defence to the plaintiff's claim.
6. On 2 August 2013, the plaintiff entered an interlocutory judgment against the defendants on the basis that no defence was filed though the acknowledgement was filed by the defendants.
7. The plaintiff then filed summons for assessment of damages. That summons was served on the first named first defendant by substituted service by advertising in the Fiji Sun 20 February 2014.
8. The learned Master heard the summons for assessment of damages and delivered his ruling on 10 July 2015. The learned Master assessed the damages in the sum of \$65,412.40.

9. Subsequently, on 2 November 2015 the defendants filed an application to set aside the default judgment entered against them.
10. Upon hearing the application to set aside on 13 May 2016, the learned Master of the High Court struck out the application. The defendants seek leave to appeal that decision out of time.

The Facts

11. In May 2013 the plaintiff filed writ of summons claiming from the defendants among other things special and general damages. According to the respondents he was an employee of the Appellant and whilst at work or during and in the course of employment was injured and sustained certain injuries due to an accident. The Respondent claims that he was a passenger whilst being employed in a vehicle that was owned by the Appellants and driven by a co-worker. The claim is made under common law negligence or in the alternative under Workmen's Compensation Act.

The Principles

12. The principles to be followed in an application for extension of time include:
 - (i) The reason for the failure to file within time.
 - (ii) The length of the delay
 - (iii) Whether there is a ground of merit justifying the appellate court's consideration.
 - (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
 - (v) If time is enlarged, will the respondent be unfairly prejudiced?

The Decision

13. The applicant seeks leave of the court to appeal the learned Master's ruling of 13 May 2016 where he refused to set aside a default judgment entered against the applicant for failure to file statement of defence.
14. The order delivered by the learned Master refusing to set aside the default judgment is an interlocutory order. There leave is necessary to appeal that order.
15. The appellate court has to exercise judicial discretion in granting leave to appeal out of time. Having this in mind, I will consider the factors to be considered in enlargement of time application.

The reason for the failure

16. The applicant does not give good reason for failing to file and serve an application for leave to appeal within the prescribed time, which is 14 days of the delivery of the order or judgment (see O.59, r.11, HCR). However, in his written submission the applicant states that the delay in filing these proceedings is based on the applicant's ill understanding of the matter.
17. The learned Master delivered his ruling on 13 May 2016. The application for leave to appeal should have been filed by 27 May 2016. The applicant has filed his summons in this court seeking enlargement of time on 16 August 2016. Therefore the delay is 77 days.
18. In *Atami Beci and Others v Jonetani Kaukimoce and Others* (Misc. Action No.2 of 2009), the reasons for the delay were unsatisfactory. However the court granted leave to appeal out of time primarily because of the important questions of law involved.

Meritorious Ground of Appeal

19. Whether there is a ground of merit justifying the appellate court's intervention. The first proposed ground of appeal is that the learned Master erred in law and in fact in finding that the default judgment sealed on the 2nd August 2013 was irregular when in fact the statement of defence was lodged with the registry by way of letter dated the 1st July 2013.
20. The defendants filed in court a defence by way of the letter written on the 15 July 2013. Counsel for the applicant submits that the letter duly constituted the statement of defence filed by the applicants. He relied on Order 18, rule 5 of the High Court Rules 1988 ('HCR'), which provides:

"Pleadings: formal requirements (O.18, r.5)

5. (1) Every pleading in an action must bear on its face –

- a) the year in which the writ in the action was issued and the number of the action,***
- b) the title of the action,***
- c) the description of the pleading, and***
- d) the date on which it was served***

(2) Every pleading must, if necessary, be divided into paragraphs numbered consecutively, each allegation being so far as convenient contained in a separate paragraph.

(3) Dates, sums and other numbers must be expressed in a pleading in figures and not in words.

(4) Every pleading of a party must be indorsed –

(a) where the party sues or defends in person, with his name and addresses;

(b) In any other case, with the name or firm and business address of the solicitor by whom it was served and also (if the solicitor is the agent of another) the name or firm and business address of his principal.

(5) Every pleading must be signed by the party's solicitor or by the party, if he sues or defends in person.” [Emphasis added]

21. The applicants in the letter filed with the registry states that “In response to the summons served in regards to the above, we would like to raise the following details in **defence to the claim by the Plaintiff**”. Then the letter outlines the defence that the applicants relied on. The letter states among other things that:

‘... we had clearly stated that the Respondent/Original Plaintiff was involved in the accident on 27th October 2010 however he was at work on 28th October 2012 and following that he had uplifted his wages for 28th October 2012, 7th November 2012, 14th November 2012, and 6th December 2012 by himself or his mother or was dropped by my employee at the Respondents home.

The Respondent/Original Plaintiff was also involved in a serious vehicle accident while he was abroad in New Zealand and the injuries that he is claiming for damages were from the said accident...’

22. Counsel for the respondent did not make any comment on the letter filed by the applicants on 15 July 2013. He simply submits that he cannot comment on it as it was discovered by the learned Master.
23. In my opinion the letter filed by the applicants in the registry constitutes a defence, for it contains all the particulars required in O.18, r.5 of the HCR. Therefore the letter should have been treated as a statement of defence.
24. The letter was not discovered in the search done by the plaintiff. If it was discovered at that time the plaintiff could not have entered default judgment in default of defence.
25. It appears to me that the default judgment against the applicants was entered irregularly. Therefore, the proposed ground of appeal that the default judgment was entered irregularly will probably succeed.
26. The respondent did not raise the issue of specific prejudice that would be caused to him if leave to appeal out of time is granted. The prejudice that may be caused to the respondent by granting leave to appeal might be compensated by an order of costs.

Conclusion

27. The delay is substantive and it remains unexplained. However, I am satisfied that there is a ground of appeal that will probably succeed. I therefore grant leave to the applicants to appeal out of time the learned Master's ruling of 13 May 2016. The applicants will file and serve notice of appeal in 7 days from the date of this ruling. The applicants will pay summarily assessed costs of \$750.00 to the respondent.

Final Outcome

- 1) Leave granted to appeal out of time.
- 2) The applicants will file and serve notice of appeal in 7 days (working days) from the date of this ruling.
- 3) The applicants will pay summarily assessed costs of \$750.00 to the respondent.

M H Mohamed Ajmeer
20/10/16

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M H Mohamed Ajmeer

JUDGE

At Lautoka

20th October 2016

