

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 78 OF 1995

BETWEEN : **CHANDRA DEO** and **SURUJ WATI** both of Johnson Road,
Lautoka.

PLAINTIFFS/RESPONDENTS

A N D : **VIJAY KUMAR**, President **KAMLA PRASAD**, Sirdar **UMESH CHAND** Secretary, **BISUN DEO**, **PRASANJIT NARAYAN** Committee Members of Teidamu LT 31 Cane Harvesting Gang sued on behalf and as representing all members of the said gang Except the Plaintiffs.

DEFENDANTS/APPLICANTS

Appearances : Mr Mohammed Z.S for applicant/defendant
Mr Patel K. for Respondent/Plaintiff

Date of Hearing : 4 October 2017

Date of Ruling : 4 October 2017

R U L I N G

Introduction

[01] This is an application filed by Mr Umesh Chand, the third named defendant (*“the applicant”*) for leave to appeal the decision of the Learned Master (Master) (essentially, my decision delivered on 26 March 2014 (written reasons given on 2 April 2014) sitting as acting Master of the High Court refusing to set aside a default judgment of 17 July 2008 entered against the applicant. The applicant also seeks a stay of execution. The application is supported by an affidavit sworn by the applicant.

- [02] This application is made pursuant to O.59, r.8.9.10 & 11 of the High Court Rules 1988, as amended (“HCR”).
- [03] The plaintiff (“*the respondent*”) appearing by counsel states that he is not going to file any response to this application.
- [04] At the hearing, both parties made oral submissions.

The Law

- [05] Rules 8 to 11 of Order 59 would be relevant to this application

Appeal from Master’s decision (O.59, r.8)

‘8.-(1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.’

Time for appealing (O.59, r.9)

‘An appeal from an order or judgment of the Master shall be filed and served within the following period-

- (a) 21 days from the date of delivery of an order or judgment;
- (b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

Extension of time (O.59, r.10)

‘10.-(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter-partes summons supported by an affidavit.’

Application for leave to appeal (O.59, r.11)

‘11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.’

Governing Principles

[06] The governing principles for extension of time include:

- (i) Length of delay;*
- (ii) Reason for the delay;*
- (iii) Chance of appeal succeeding if time for appeal is extended; and*
- (iv) The degree of Prejudice to the Respondent if the application is granted.*

[07] The applicant is seeking leave to appeal the Master's decision made on 26 March 2014. The Master's order appears to be an interlocutory order. An interlocutory order delivered by the Master may be appealed with the leave of the Court. Any application for leave to appeal an interlocutory order of judgment must be filed and served within 14 days of the delivery of such order or judgment (See O.59, r.11). The applicant did not obtain leave to appeal the Master's order. Instead, the applicant unsuccessfully lodged an appeal, without leave being obtained, to the High Court. Abeygunaratne, J (as then was) struck out and dismissed that appeal by his ruling dated 20 July 2015.

[08] Extension of time is sought to appeal the Master's decision of 26 March 2014 by the application filed on 27 September 2017. The length of the delay is approximately 3 years and 5 months. The delay is too long and is inexcusable.

[09] The reasons given by the applicant for the delay is that:

- a. After the Ruling was delivered by Justice Lal S Abeygunaratne I was mindful that the Appeal of the Master had already been dealt with.*
- b. It was also an oversight on part of my solicitors and we were of mindful that the Appeal has been dealt with.*

c. Just recently on a second glance at the Ruling of Justice Lal S Abeygunaratne made my solicitors realise of the present application and hence I was informed of the same immediately (See para 10 of the supporting affidavit of the applicant).

- [10] The reasons and explanation given by the applicant for the delay are not sufficient to consider leave to appeal out of time after such a long delay.
- [11] Chance of appeal succeeding, if the time for appealing is extended, is unlikely. In the proposed statement of defence, the applicant generally denies the claim without solid defence on merits. He further states in the proposed defence that there are serious questions which require the court's attention without even specifying the serious questions. He simply states that the plaintiff's claim is contrary to Sugar Industry Act without giving any base.
- [12] It goes without saying the plaintiff will be prejudiced if the application is allowed. The plaintiff initiated this action in 1995 and he was able to obtain the default judgment against the defendant in July 2008. Apparently, the plaintiff is attempting to upset the default judgment more than 9 years after the judgment was entered. The current application has emerged at the time when the plaintiff intends to enforce the judgment by the sale of the applicant's property.

Conclusion

- [13] The long delay was not explained sufficiently. The proposed defence does not disclose a defence on merits. Chance of appeal succeeding if the time for appealing is extended is unlikely. The plaintiff will be prejudiced if the application is granted at this execution stage. I would, therefore, refuse to grant leave to appeal out of time the Master's order delivered on 26 March

2014 refusing to set aside the default judgment entered against the applicant on 17 July 2008.

[14] Since I have refused to grant leave to appeal out of time the question of a stay of execution does not arise.

Final Outcome

1. Leave to appeal out of time is refused.
2. No order as to costs.

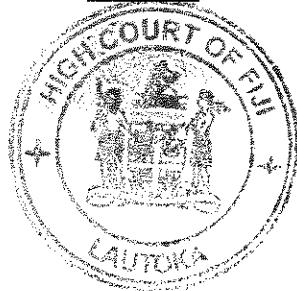
M. H. Mohamed Ajmeer
4/10/17

M. H. Mohamed Ajmeer

JUDGE

At Lautoka

4 October 2017



Solicitors:

For applicant: M/s Pillai Naidu & Associates, Barristers & Solicitors

For respondent: M/s Krishna & Co, Barristers & Solicitors