

In the High Court of Fiji  
At Suva  
Civil Jurisdiction

Civil Action No. HBA 07 of 2018

Eden & Associates Limited

Appellant

v

Ajay Lal

Respondent

Counsel: Ms A. Ali for the appellant  
Ms M. Rakai for the respondent

Date of argument: 12<sup>th</sup> October, 2018

Date of Judgment: 31<sup>st</sup> May, 2019

**Judgment**

1. The appellant appeals from a judgment of the Magistrates' Court of 8 January, 2018, dismissing the appellant's application for stay of execution pending appeal and enlargement of time to file notice of appeal.
2. The grounds of appeal read as follows:

*The Learned Magistrate erred in law and in fact and failed to exercise his discretion judicially and in accordance with applicable legal principles, inter alia, by –*

- a) *Wrongly finding that the Magistrates' Court does not have inherent jurisdiction.*
- b) *Wrongly finding that it is a trite law that an application for stay of execution can only be considered if there is a pending appeal;*
- c) *Wrongly finding that the Notice of Intention to Appeal was not duly and properly filed until 3<sup>rd</sup> February 2017;*
- d) *Wrongly finding that the Notice of Intention of Appeal was not served on the Respondent (Original Plaintiff);*
- e) *Wrongly finding that an application for enlargement of time to file a Notice of Appeal was necessary by, inter alia, -*
  - 1) *Wrongly finding in paragraph 3 of the 8 January 2018 Ruling that the Order sought in paragraph (c) of the First Notice of Motion and Order 2 of the Notice of Motion filed on 25 April 2017 are wrong by repeating the misnomer that the Magistrates' Court being a creature of statute has no inherent jurisdiction by:*

- (a) *Failing to recognize that the term inherent jurisdiction is not used in contradistinction to the jurisdiction of the court exercisable at common law or conferred on it by statute, the Constitution of Fiji or rules of court, for the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court;*
  - (b) *Failing to recognize that the Magistrates' Courts' lack of inherent powers to accept jurisdiction to entertain a certain type of suit which is not stipulated in the Magistrates' Court Act is not the sum total of its inherent jurisdiction and that "inherent jurisdiction" is a broad doctrine defined as being the reserve or fund of powers or a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them; that is, a court has inherent jurisdiction to control its own process and to control the procedures before it and that power stems not from any particular statute or legislation, but rather from inherent powers vested in a court to control the proceedings brought before it;*
  - (c) *Failing to give adequate consideration or to consider all that the only permissible grounds of appeal are stated in section 33(1)(a) and (b) of the Small Claims Tribunal Decree and neither was cited in ISF's Grounds of Appeal; and*
  - (d) *Wrongly asserting his authority to imply and rely upon grounds of appeal that were not cited by ISF in its Notice of Appeal.*
- 2) *Wrongly finding in paragraph 4 of the 8 January 2018 Ruling that it is trite law that an application for stay of execution can only be considered if there is a pending appeal, by inter alia, -*
- (a) *Failing to give adequate consideration to Order XXXVII – Civil Appeals, Rule IV – Execution Pending Appeal by which the Court had the discretion to order that a Notice of Intention to Appeal shall operate as a stay of execution;*
  - (b) *Failing to apply well-established law that a stay of execution may be granted where there are special circumstances and failing further to consider whether such circumstances exist in this case;*
  - (c) *Failing to give adequate consideration to the principle that the Court had unfettered discretion to impose a stay of execution if the justice of the case so demands and failing to consider that the Court's inherent jurisdiction was sought to consider the justice of the case.*
- 3) *Wrongly finding in paragraph 10 of the 8 January 2018 Ruling that the Notice of Intention to Appeal was not duly and properly filed until 3<sup>rd</sup> February 2017, by inter alia, -*
- (a) *Failing to note from the File Record that the Notice of Intention to Appeal was received by the Magistrates' Court Registry – Civil on the due date being 24 January 2017; however, the Registry sought time to seek consent of the Magistrate prior to accept said Notice for filing and it was the Registry that forwarded the said Notice to the Honourable Magistrate on 2 February 2017. February 2017 to the filing of Notice of Intention to Appeal, which had been received in the Registry on the due and proper date of 24 January 2017;*

- (b) *Failing to take judicial notice that responsibility for the delay in filing the Notice of Intention to Appeal lay solely with the Magistrates' Court Registry – Civil due to their unfamiliarity with the Magistrates Court Act;*
  - (c) *Failing to apply well established law that a judgment or order required to be entered is only entered and thereby perfected after it is drawn up and sealed and signed, which in this case was 31 January 2017, and therefore the time for filing the Notice of Intention to Appeal is in fact 7 days therefrom, being 7 February 2017.*
- 4) *Wrongly finding in paragraph 10 of the 8 January 2018 Ruling that the Notice of Intention to Appeal was not served on the Respondent (Original Plaintiff) by inter alia, failing to note that Annexure "GE 3" of Affidavit of Geoffrey Mark Eden in Support of the Summons or Enlargement of Time in which to file Grounds of Appeal has a stamped copy of the backing page of the Notice of Intention to Appeal indicated the acceptance of service by the other Party on 8 February 2017.*
  - 5) *Wrongly finding that an application for enlargement of time to file a Notice of Appeal was necessary, by inter alia, -*
    - (a) *Wrongly finding that Order 37 Rule 1 of the Magistrate Court Rules had not been complied with in that the Appellant did not file the Notice of Intention to Appeal in a timely manner whereas the Appellant had done so;*
    - (b) *Wrongly considering that stay of execution could not be granted on the basis of Order 37 Rule 1 not being complied with.*
3. The first ground of appeal takes issue with the finding that the Magistrates' Court is a "creature of statute (and) has no inherent jurisdiction".
  4. Section 101(2) of the Constitution provides that the "Magistrates Court has such jurisdiction as conferred by a written law".
  5. In *Ali v Chandra* [2014] FJHC 710; HBA14.2013 (30 September 2014) Kumar J,(as he then was) as referred to in the written submissions filed by the respondent, stated:
 

*It must be noted at the outset that the Magistrate Court is created by statute and Magistrates derive their jurisdiction through the statute and therefore do not possess inherent jurisdiction(s101(2) of the Constitution of the Republic of Fiji).(emphasis added)*
  6. The contention that the Magistrates' Court has inherent jurisdiction fails.

7. The second ground urges that the Learned Magistrate wrongly found that that an application for stay of execution can only be considered if there is a pending appeal and failed to give adequate consideration to “*Order XXXVII – Civil Appeals, Rule IV – Execution Pending Appeal*”, by which the Court had the unfettered discretion to order that a Notice of Intention to Appeal shall operate as a stay of execution, which may be granted where there are special circumstances.
8. In my judgment, it is trite law that an application for stay of execution can only be considered if there is a pending appeal .
9. The Magistrates’ Court has no discretion to order that a Notice of Intention to Appeal shall operate as a stay of execution . Or 37, r.6 clearly provides that “ *Neither notice of intention to appeal nor an appeal shall operate as a stay of execution or of proceedings under the judgment or decision appealed from.* ” (emphasis added)
10. The third, fourth and fifth grounds of appeal contend that the lower court erred in finding that the notice of intention to appeal was not duly and properly filed until 3<sup>rd</sup> February, 2017, when the record provides that it was received by the Registry on 24 January, 2017.
11. The Learned Magistrate delivered his substantive decision on 16 January,2017. The Record provides that notice of intention to appeal was received by the Registry on 24th January, 2017.
12. Ms Ali, counsel for the appellant submitted that the Registry declined to accept the notice, as it was one day out of time.
13. Or 37, r 1 provides that the notice of intention to appeal has to be filed and served on the respondent “*within seven days after the day on which the decision was given*”.
14. In *Crest Chicken Ltd v Central Enterprise Ltd*, [2005] FJHC 87;HBA 0013j.2003(19 April, 2005) Pathik J held that in “*Order XXXVII r.1 there is no provision for extension of time to give notice of intention to appeal, although there is power to extend time to file Grounds of Appeal under Or.37 r.4*”.

15. Calanchini J (as he then was ) in *Kirpa Nand v Famous Pacific Shipping (NZ) Ltd*, Civil Appeal No. 6 of 2009, (29<sup>th</sup> October,2010) stated:

*Under Order XXXVII of the Magistrates' Court Rules, an Appellant should give notice of intention to appeal either by giving notice verbally to the Court in the presence of the opposite party immediately after judgment is announced, or within 7 days by notice in writing served on the Court and the Respondent (Rule 1). The grounds of appeal are to be filed in court and served on the Defendant within 1 month of the decision (Rule 3).*

16. Kumar J(as he then was) in *Sami v Pacific Feeds Ltd*, [2016] FJHC 232; HBC 05.2014 (18 March 2016) stated :

*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.*

17. In the instant case, the notice of intention to appeal was filed one day out of time. The appellant has not filed an application to extend time to file .

18. In my judgment, the Learned Magistrate correctly found that the appellant failed to comply with the mandatory terms of Or 37, r 1. The third, fourth and fifth grounds of appeal are dismissed.

19. The Learned Magistrate incorrectly found that the notice of intention to appeal was not served on the respondent, as contended by the appellant. It was served out of time on the respondent on 8 February, 2017 as conceded by Ms Ali.

20. The final ground of appeal contends that the lower court erred in finding that an application for enlargement of time to file a notice of appeal was necessary, by wrongly finding that Order 37, r 1 had not been complied with and that stay of execution could not be granted for that reason.

21. In my judgment, the Learned Magistrate quite correctly held that an application for enlargement of time to file a notice was necessary.

22. The appeal fails.

23. *Orders*

- a. The appeal fails.
- b. The appellant shall pay the respondent costs summarily assessed in a sum of \$1000.



**A.L.B. Brito-Mutunayagam**  
**JUDGE**

31<sup>st</sup> May, 2019

