

-IN THE HIGH COURT OF FIJI
CIVIL JURISDICTION

Civil Action No. HBC 163 of 2015

BETWEEN: RABENDRA KUMAR

PLAINTIFF

AND: PRAVEEN KUMAR

FIRST DEFENDENT

MATELITA ROKOVI

SECOND DEFENDENT

HOUSING AUTHORITY

THIRD DEFENDENT

THE REGISTRARA OF TITLES OFFICE

FOURTH DEFENDENT

Counsel : Plaintiff: Mr Gosaiy
: First & Second Defendants: Mr Faktaufon. V
: Third Defendant: Ms Disiga. F
: Fourth Defendant: Ms Chand. S
Date of Hearing : 4.3.2021
Date of Judgment : 5.3.2021

JUDGMENT

INTRODUCTION

1. This is the second application filed by the Plaintiff seeking extension of time for leave to appeal and leave to appeal against Master's decision which struck off the action for abuse of process. The first application for seeking extension of time against Master's decision was

granted, but due to operation of law, Appeal was deemed abandoned in terms of Order 57 rule 17 of High Court Rules 1988 (HCR). Plaintiff filed the same application again seeking extension of time and leave to appeal. The strike out of this action was based on previous **originating summons** filed by Plaintiff and his son against first and second Defendant restraining him from dealing with the Native Lease No 22838 (The Property) and seeking a declaration that transfer of the said property to second Defendant null and void and for an order to restore it to former state. This action was struck off for want of prosecution in terms of Order 25 rule 9 of HCR by Master, and purported reinstatement application to Master was also struck off for want of jurisdiction. After the dismissal of said originating summons, Plaintiff filed present action through a **writ of summons** seeking several declarations based on fraud and also seeking nullification of power of attorney granted to first Defendant by Plaintiff and cancellation of the transfer of the Property based on **fraud**. It is trite law that an allegation of fraud cannot be determined in originating summons, unless acts that constitute alleged fraud are not in dispute. There was no claim for fraud in the originating summons filed in Civil Action No 141 of 2010. In any event, an originating summons can be converted in to writ of summons or dismiss on the basis of unsuitability. Sometimes it is common practice to withdraw originating summons after discovering that it was not the proper procedure, and later institute an action by way of writ of summons. The only issue that may arise, by such abandonment of originating summons, is the cost for the other party. Such actions are not considered abuse of process to dismiss subsequent action commenced by writ of summons. This vital fact was not elicited before Master or at the hearing before me. Mater in his decision of 23.9.2016 stated that reliefs sought in originating summons and present action were similar. Originating summons and its scope and resorting to writ of summons seeking similar reliefs any bar for such action was not discussed. A party may discover that originating summons is not suitable for a particular case and implication of such change of mode was not discussed, in Master's decision. In the circumstances there is a good chance of success for Plaintiff's Appeal if extension for time for leave to appeal and leave to appeal is granted. In fact it would be hard to justify abuse of process only on the basis that facts and reliefs contained in originating summons which was struck off and present writ of summons were similar. The claim for fraud was not part of originating summons. Though there is considerable delay in this application considering the very high likelihood of success of appeal and the end of the road for Plaintiff seeking relief from court with striking out are factors that favor granting extension of time and leave to appeal against Master's decision handed down on 23.9.2016

FACTS

2. On 23 .4. 2015, Plaintiff filed Writ of Summons with Statement of Claim and subsequently statement of claim was amended. Third and fourth Defendants had filed their statements of defence.
3. On 21.5. 2015, first and second Defendants , filed an application to Strike Out on the grounds that it is an abuse of Court process to institute this action as Plaintiff had instituted originating summons against first and second Defendants in HBC 141 of 2010.

4. Master delivered Ruling on 23.9. 2016, and action was struck out with costs. The strike out was mainly based on the previous originating summons HBC 141 of 2010 and its strike out in terms of Order 25 rule 9 of HCR.
5. It is an admitted fact that Plaintiff and Defendants were parties in the previous originating summons and the subject matter is the Property, but in writ of summons there was a claim for fraud and also addition of third and fourth Defendants. Apart from that there were other reliefs which were not part of originating summons, though the subject matter and alleged fraud had arisen from same facts.
6. Originating summons was filed by Plaintiff and his son against first and second Defendants *inter alia* for breach of fiduciary duty and sought nullification of transfer of the Property to second Defendant and for orders to restrain first and second Defendants from dealing with the Property. This originating summons was struck off for want of appearance after giving notice to appear.
7. So originating summons, HBC 141 of 2010 was struck off without determination of the merits of that action. This was apparently on the basis of Order 25 rule 9 of HCR.
8. Master struck off present action on 32.9.2016 on the basis of abuse of process, based on two actions had arisen from same facts.
9. Plaintiff could not file an application seeking leave to appeal within stipulated time but court had granted extension of time and also leave on 22.11.2019. Accordingly a Notice and Grounds of Appeal was filed on 4.12.2019 but it deemed abandoned in terms of Order 59 rule 17 of HCR for want of prosecution.
10. Again Plaintiff filed an application seeking extension of time for leave to appeal and leave to appeal on 30.10.2020.

ANALYSIS

11. Plaintiff did not apply to seek leave to appeal against interlocutory decision of Master delivered on 23.9.2016 within 14 days in terms of HCR.
12. This application is the second application seeking enlargement of time for leave to appeal and leave to appeal.
13. Master's decision dated 23.9.2016 was an interlocutory order in line with Fiji Court of Appeal decision of *Goundar v Minister for Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008)(unreported). So, leave is required for an Appeal from the said Master's decision.

14. Order 59 rules 10 and 11 of the HCR states as follows

“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- parte summons supported by an affidavit.

Application for leave to appeal (O.59, r.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.” (emphasis added)

15. The Order 59 rule 10 of HCR applies to the enlargement of time for Notice of Appeal or Cross Appeal and has no relevance to the Summons filed by the Plaintiff seeking extension of time for Leave to Appeal. It should be noted that both Order 59 rule 10(2) of HCR and rule 11 required the service of the application.

16. Neither Order 59 rule 8(1) nor Order 59 rule 10(1) of HCR allows the High Court to grant extension of time for leave to appeal against interlocutory decision. The Order 59 rule 11 of HCR deals with the leave to appeal and there is no mention of enlargement of time or regarding such application for enlargement of time.

17. Since neither side could point out specific law, it is the general provision contained in Order 3 rule 4 of the HCR is applied for present application seeking extension of time.

18. The Order 3 rule 4 of HCR states as follow;

‘4(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is **required or authorized by these rules**, or by any judgment, order or direction, to do any act in any proceeding’. (emphasis added)

19. It is an exercise of discretion of the court, and there can only be guide lines and rigid rules may curtail the exercise of the discretion of the court and may result injustice and curtail the access to justice on mere technicalities leaving the pertinent legal issues unresolved.

20. In this instance there is a considerable delay and even after granting previous application, and having filed Grounds of Appeal and Notice of Appeal, the appeal was deemed abandoned. In my opinion though the rules of the court needed to be followed the discretion of the court should not be in favour of dismissal of a matter when there are merits. So the deciding factor is merits and more the delay, stronger chance of success needs to be demonstrated.

21. But the delay should be considered against the consequence of the refusal of the application based on delay. If this is done without considering the merits of the appeal against the Master's decision, Plaintiff's access to court will come to an end without a determination of facts and merits.
22. *Emanuel v Australian Securities Commission* [1997] HCA 20; 144 ALR 359 Kirby J stated,

'In many cases which depend upon the meaning of legislation found to be ambiguous, strong arguments can be assembled for the competing points of view. So it has proved in this appeal. We deceive ourselves in such cases if we pretend that there is only one available interpretation. The judicial task is to seek out and to declare the preferable construction of the legislation. Only then does it become the one interpretation which the law holds to be correct.'
23. There are judgments of the this court as well as Fiji Court of Appeal and even Supreme Court of Fiji dealing with the non-compliance of rules relating to Leave to Appeal . If one considers all of them they may not be coherent and there may be some difficulty in reconciling. I do not propose to venture such an exercise in this decision, but suffice to state discretion granted to High Court in Order 3 rule 4 of the High Court, is unfettered, and can be applied even in this instance for considering an application for second time for enlargement of time, where earlier extension was deemed abandoned due to ignorance or deliberate non compliance, which is hard to distinguish, but the prejudice to Plaintiff is irreparable.
24. The Master by Ruling delivered on 23.9.2016 had struck off the action. In the exercise of my discretion the decisions of the Courts are used as a guide line, though they are not exhaustive, but at the same time mindful of the recent trends in regard to failure to comply the procedural requirements or technicalities.
25. There cannot be rigid law preventing the exercise of the court's discretion on a matter which will deny a party its right to come before the court, if there is some injustice. This is specially so, if an action is struck off before hearing for non-compliance of a requirement that could be cured through an amendment.
26. Though not exhaustive in the exercise of discretion under Order 3 rule 4 of HCR 1988 the following may be considered and their cumulative effect is taken and they are
 - a) the interests of the of justice and specially the failure to exercise extension and consequences . Eg. If the failure to enlarge time would result denial of access to a party.
 - (b) whether the application for extension has been made promptly.
 - (c) whether the failure to comply was intentional, for e.g. non-compliance of unless order or after an extension of time delaying taking further steps.
 - (d) whether there is a good explanation for the failure.

(e) The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.

(f) whether the failure was caused by the party or his legal representatives. E.g. mistake of law or fact

(g) Effect of extension have on the trial, if the action is still pending before the court.

(h) the effect which the failure as opposed to granting extension, on all the parties including interest of public if any.

(i). If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.

(j) The effect of extension on case management and right of a party for determination of a civil action without delay.

(k) Whether the defect is curable, and if so the prejudice to other party

(l) Prejudice to Defendants in granting extension.

27. I do not indent to address all the issues relevant to this action. The main and deciding factor is merits of the appeal. Master had struck off this writ of summons on the basis of previous originating summons HBC 141 of 2010. This originating summons was struck off without determination, and there was no claim for fraud, as contained in writ of summons.

28. Originating summons sought following orders

‘Any further dealing on the property described in the Affidavit of Ronesh Kumar be stayed pending the settlement of the matter herein.

The Defendant, their servants and or agents be stayed from further dealings of the property pending settlement of the matter herein.

The recent transfer of the property to the Second Defendant be declared null and void due to breach of fiduciary duty by the first Defendant.

The Property to be restored to its former state by the Defendants.’

29. Originating summons cannot determine the disputed fact of breach of fiduciary duties by first Defendant under Power of Attorney granted by the Plaintiff.

30. So, on that basis alone that originating summons needed to be converted to writ of summons, or struck out. If struck off, that does not preclude a party from filing an action by way of writ of summons for same relief. But this did not happen as the originating summons was struck off for want of prosecution.

31. Present action is filed to nullify the transfer of property to second Defendant, on the basis of fraud. The claim for fraud was not part of previous originating summons and it is trite law that fraud is an exception to indefeasibility of title.
32. Originating summons filed by Plaintiff and his son was never determined by court. Hence even if the claims in writ of summons and originating summons were identical, it cannot be considered as abuse of process. It is common practice that parties seek orders by way of originating summons but when the facts are disputed, they withdraw originating summons to institute the same by way of writ of summons.
33. There are merits on this appeal against the Master's decision.
34. When there are strong merits Court of Appeal held that absence of explanation as to delay is not determinative *Autoworld Trading (Fiji) Ltd v Raidruta* [2019] FJCA 32; ABU62.2017 (decided on 8.3. 2019)
35. There is no prejudice to first and second Defendants as they were not in occupation of the property though second Defendant purchased it.

CONCLUSION

36. There are merits contained in the deemed abandoned grounds of appeal. Though there is considerable delay since Master had struck off the entire action extension of time for leave is granted along with Leave to Appeal. Plaintiff is directed to pay costs ordered previously in similar application, I will not order costs for this application considering circumstances of the case.

FINAL ORDERS

- a. Leave is granted to Plaintiff to file leave to appeal out of time.
- b. Leave is granted for Applicant to Appeal Master's decision delivered on 23.9.2016.
- c. Plaintiff to file and serve Notice of Appeal and Grounds of Appeal within **seven days**.
- d. Plaintiff is directed to pay cost ordered previously by this court in similar application, if they were not paid.
- e. No order as to the cost of this application.

Dated at Suva this 5th day of March, 2021.



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Justice Deepthi Amaratunga
High Court, Suva