

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
APPELLANT JURISDICTION

HBA 11 of 2021

IN THE MATTER of an Appeal from the decision of the Learned Magistrate sitting at the Magistrates Court of Fiji in Nadi on the 17th day of December 2021 in Civil Action No. 100 of 2021.

BETWEEN : **VINENDRA PRASAD** and **GITA SAMUJH**

Applicants/Original Defendants

AND : **AVINESH CHAND MAHARAJ**

Respondent/Original Plaintiff

Appearances : Applicants in Person
Mr. Chand for the Defendant

Date of Hearing : 25 August 2022

Date of Ruling : 02 September 2022

R U L I N G

INTRODUCTION

1. A preliminary point has been raised in this appeal matter. The question is whether the court has discretionary power to extend the time for filing of the Notice of Appeal of the decision of the Magistrates Court.
2. Mr. Chand relies on **Simon Seru v Credit Corporation Limited** –Civil Appeal No. ABU 0115 of 2016 which was delivered on 01 June 2018; **Lal v Verma** [2012] FJHC 1266; HBA004.2009 (7 August 2012); **Ratnam v Cumarasamy** 1964; **Unisan Company Ltd v Virs Construction Company Ltd** [2017] FJHC 311; HBA22.2016 (28 April 2017); **Saukuru v Sivam & Co Ltd** [2018] FJHC 489; HBA06.2018 (11 June 2018).
3. The appellants have not filed any written submissions.
4. I have also reviewed the following cases:

- (a) **Crest Chicken Ltd v Central Enterprises Ltd** [2005] FJHC 87; HBA0013j.2003s (19 April 2005)
 - (b) **Katafono v. Brown** (2016) Civil Action No. HBC 135 of 2014 (14 January 2016)
 - (c) **Sami v Pacific Feeds Ltd** [2016] FJHC 232; HBC05.2014 (18 March 2016)
 - (d) **Tausere v Clayton** [2015] FJHC 902; HBM141.2014 (18 November 2015)
5. In **Katafono v Brown**, Kumar J (as he then was) observed that there had been great confusion and inconsistency in judicial pronouncements as to whether or not the Magistrates Court has jurisdiction to extend time to file Notice of Intention to Appeal Out of Time.
 6. The genesis of that confusion appears to be in the decision of Pathik J in **Crest Chicken Ltd v Central Enterprises Ltd** [2005] FJHC 87; HBA0013j.2003s (19 April 2005).
 7. In **Crest**, the issue was whether the judgment of the Magistrate's Court in accepting the Notice of Intention to Appeal out of time was valid in accordance with Order 37 Rule I of the Magistrate's Courts Rules, and whether in making that decision the Magistrate was acting within his inherent jurisdiction.
 8. Pathik J held as follows:

It is Or 37 Rule I of the Magistrate's Courts Rules which sets out the time within which Notice of Intention to Appeal shall be given. The Order reads as follows:

Every appellant shall within seven days after the day on 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, 1950.)

This is a mandatory Rule and it does not give the Magistrate power to extend time. Even if he had, no application was made by the appellant for extension for it was already late in filing or giving Notice of Intention to appeal within the seven days after judgment was pronounced.
 9. Pathik J held however that the Magistrates Court had power to extend time to file grounds of appeal under Order 37 Rule 4.

Had the legislature intended (to give power to extend time to file Notice of Intention to Appeal) it could have specifically provided for application to extend time. It did not do so in Or. 37 R.1 but Or. 37 R.4 which provides as follows, gave the Magistrate's Court power to extend time to file grounds of appeal.

On the appeal 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.
 10. In that case before Pathik J, the applicant had filed his Notice of Intention to Appeal out of time, but the Grounds of Appeal were within time. Pathik relied on two New Zealand cases

namely Taylor v Waikohu County Council [1922] N.Z.L.R and Crowe v McWatt (Vol.XXXIII – Invercargill N.Z. 1913) where the view was expressed that the Courts have no general jurisdiction to dispense with the provisions of the statute¹.

11. Pathik J also drew support from Ratnam v Cumarasamy 1964 3 All E.R. 933 at 934 where the following approach was favored:

“The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation”

12. He concluded as follows:

In the outcome for the above reasons the appeal before the Court is invalid for non-compliance with the mandatory provisions of Or. 37 r. 1 of the Magistrate’s Courts Rules. There was never at any time an application to apply for extension of time to give Notice of Intention to Appeal out of time or to file Grounds of Appeal. This was a sine qua non to enable the learned Magistrate to consider the stay application herein.

This being the case, as I have found, and in view of the orders which I will make I do not consider it necessary to deal with the Grounds of Appeal or the appeal.

It being an irregular appeal and one not capable of being cured in the light of the authorities referred to hereabove, I dismiss the appeal with costs which I summarily assess at \$500.00 to be paid within 21 days.

13. Mutunayagam J followed the above approach in Lal v Verma [2012] FJHC 1266; HBA004.2009 (7 August 2012). However, he changed position, as he is entitled to, in Kwan v Pepes Limited [2015] FJHC 56; HBA28.2012 (23 January 2015) where he decided to adopt the approach of Wati J in Fiji Posts and Telecommunications Ltd.(HBA 003 of 2000L) :

In Crest Chicken Ltd v Central Enterprises Ltd.(2005) FJHC 87 it was held that the provisions of Order XXXVII, r 1 are mandatory. There is no provision for extension of time to give notice of intention to appeal.

More recently, Wati J in Fiji Posts and Telecommunications Ltd.(HBA 003 of 2000L) held that Or11,r 2 of the Magistrates Court Rules titled "Enlargement or Abridgement of Time" enables an application to be made for extension of time to file notice of intention, provided the applicant had made an attempt to obtain the consent of the other party. Wati J stated that in the absence of a specific provision, the Court can rely on the general provision, to consider the application for extension of time.

The reasoning in that judgment appeals to me, in the light of Or11,r 9 which provides that a court shall have power "to enlarge or abridge the time appointed by these Rules.."However,a party applying for an extension of time has to provide a satisfactory explanation for his delay.

14. In **Sami v Pacific Feeds Ltd** [2016] FJHC 232; HBC05.2014 (18 March 2016), Mr. Justice K Kumar (as he then was) said as follows:

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."

15. In **Katafono v Brown**, Kumar J (as he then was) was dealing with the preliminary issue as to whether the Magistrates Court or this Court has jurisdiction to deal with application to extend time to file Notice of Intention to Appeal.

16. Kumar J then went on to comment as follows on **Crest Chicken** (supra):

2.2 It is sad to note that the confusion brought about this issue is because of judicial pronouncement as a result of decision in **Crest Chicken Limited v. Central Enterprises Limited** (2005) FJHC 87, HBBA 13J 2003 (19 April 2005) (Pathik J).

2.8 In **Nand v. Famous Pacific Shopping (NZ) Limited** (2010) FJHC 619; Civil Appeal No. 6 of 2009 the Court dealt with the Application to extend time to file notice of intention to appeal and the grounds of appeal under Section 39 of Magistrates Court Act.

The Court in respect to application to extend time to file notice of intention to appeal stated as follows:

"In determining whether it should exercise its discretion to allow the Appellant to file and serve a Notice of intention to appeal out of time, the court considers four matters. They are (a) the length of the delay, (b) the reasons for the delay, (c) the merits of the proposed defence and (d) any prejudice likely to result to the Respondent."

2.9 In **Narayan v. Kumar** (2014) FJHC 187, HBA 34.2011 (20 March 2014) his Lordship Justice Amaratunga followed the decision in **Crest Chicken**.

2.10 In **Fiji Posts and Telecommunications Ltd v. Suey Loo Keen** HBA 003 of 2000L (21 March 2014) her Ladyship Madam Justice Wati held that time to file notice of intention to appeal can be extended under Order 2 Rule 2 of the Magistrates Court Rules. Order 2 Rule 2 of Magistrates Court Rules provide as follows:-

"Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the court for an order to effect the object sought to have obtained with the consent of the other party, and such order may be made although the application for the order is not made until the expiration of the time allowed or appointed".

The Court stated as follows:-

"I find that even if there is no specific power given under the said rule which prescribes the time to file the notice of intention to appeal, there is nothing in the words of Order II Rule 2 which can preclude the Court from using that rule to consider an application for extension of time to file notice of intention to appeal provided that the applicant first makes an attempt to secure consent of the other parties for doing of the act for which the application has been made in Court. In absence of a specific provision, the Court can go to the general provision to consider the application for extension of time."

2.11 In **Tausere v. Clayton** [2015] FJHC 902; HBM 141.2014 (18 November 2015) the most recent decision on this issue his Lordship Justice Seneviratne followed **Crest Chicken** and held that the Court does not have power to extend time to file Notice of Intention to Appeal once the time has expired.

2.12 His Lordship stated as follows:-

"It is difficult to understand what the learned counsel meant by saying that they were within 7 days allocated by the above provisions. This cannot be an application for the enlargement of time to file notice of intention to appeal. If it is so the application must fail in limine for the reason that the Court has no power to extend the time period allocated to file notice of intention to appeal."

2.13 **Nands** case dealt with the application for leave to file notice of intention to appeal and grounds of appeal out of time and dealt with the application under section 39 of Magistrates Court Act.

2.14 In **Post and Telecommunication** case time for filing of notice of intention to appeal and grounds of appeal was extended pursuant to Order 2 Rule 2 of the Magistrate Court Rules.

2.15 I will now look at relevant provision of Magistrate Court Rules and Magistrate Court Act that deal with Civil appeals.

2.16 The relevant rules of Magistrates Court Rules for the purpose of the issue before this Court are Order 37 Rules 1, 3 and 4. However, I will also mention Order 37 Rule 2.

2.17 The above rule requires the appellant to do the following:-

- (i) Rule 1 requires appellant to give notice of intention to appeal in writing to Court and Respondent within seven (7) days after the date decision is given;
- (ii) Rule 2 gives Magistrates Court discretion to Order appellant to provide security for costs;
- (iii) Rule 3 requires appellant to file in Magistrates Court and serve grounds of appeal within one month from the date decision is given by Magistrates Court;
- (iv) Rule 4 states that if appellant fails to comply with Rule 3 then it shall be deemed that appellant has abandoned the appeal, unless Magistrates Court or High Court shall see fit to extend time for filing grounds of appeal.

2.18 Section 38 of Magistrates Court Act provide as follows:-

"38. Subject to the provision of Section 39, the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates' court or by the Supreme Court, as prescribed by rules of the Court" (emphasis added)

2.19 Under section 38 appeal will be entertained by High Court if appellant gives notice of intention to appeal, files grounds of appeal within the prescribed time and give security for costs if ordered by Magistrates Court.

2.20 Section 39 of the Magistrates Court Act provides as follows:-

"39. Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a magistrates' court, on any terms which it thinks just." (emphasis added)

2.21 Section 39 has been used to extend time for filing of Notice of Intention to Appeal and Grounds of Appeal.

2.22 My view on section 39 is that it does not give power to Magistrates Court or High Court to extend time for filing of notice of intention to appeal or grounds of appeal but gives the High Court discretion to "entertain any appeal from Magistrates Court, on any terms which it thinks just" when the Appellant has failed to comply with rules of Court in relation to civil appeal.

2.23 For instance where the appellant files notice and grounds of appeal without giving notice of intention to appeal within the prescribed time the High Court may hear the appeal "on terms it thinks just".

2.24 Order 2 Rule 2 of the Magistrates Court Rules that was applied in **Post and Telecommunications** case does not apply here as there is no evidence that Applicant sought consent of Respondent.

2.25 I note that in the cases listed at paragraphs 2.6 to 2.11 of this ruling the Counsel for the Appellants made no reference to Order 3 Rule 9 of the Magistrates Court Rules which provide 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." (emphasis added)

2.26 Court is defined as "Magistrates Court established under Magistrates Court Act" in section 2 of the Magistrates Court Act.

2.27 It has to be noted that Order 3 Rule 9 does not relate to filing of any specific document or doing of any specific act as the heading for Order 3 is "Miscellaneous Provision".

2.28 Therefore Order 3 Rule 9 is applicable to all the provision of the Magistrates Court Rules that require parties to do any act or for taking any proceedings within prescribed time.

2.29 Filing of Notice of Intention to Appeal within the prescribed time is an act that is required to be done by the Appellant and if Appellant fails to do such act then the Magistrates Court or the High Court has unfettered discretion to extend time for appellant to do such an act.

17. At paragraph 2.30, Kumar J concluded

2.30 Finally this Court is of the view that:-

(i) Section 39 of the Magistrates Court Act does not give this Court discretion to extend time for filing of notice of intention to appeal or grounds of appeal but gives this Court power to deal with the appeal before the Court on terms it thinks just even though appellant has not complied with rules in respect to Civil Appeal (ss38 and 39 of Magistrates Court Act);

(ii) This Court and Magistrates Court has jurisdiction/discretion to extend time for filing of notice of intention to appeal and grounds of appeal under Order 3 Rule 9 of the Magistrates Court Rules, even if Application to enlarge time is made after prescribed time has expired.

This view has some support from what was said in Isikeli Maravu Tuituku & Anor. v. Isikeli Tuituki & Ors, Family Court Appeal No. 1 of 2014 (7 December 2014) (Wati J).

18. I will allow myself to be guided by the above sentiments. Accordingly – I conclude that this Court may deal with the appeal before it on terms it thinks just – even if the Appellant has not complied with sections 38 and 39 of the Magistrates Court Act.



.....
Anare Tuilevuka
JUDGE
Lautoka

02 September 2022

¹ As Pathik said:

Order 37 r1 of the Magistrate's Courts Rules is abundantly clear that 'every appellant shall within 7 days after the day on which the decision was given' give notice in writing of intention to appeal.

In Taylor v Waikohu County Council [1922] N.Z.L.R it was held that the 'formalities required by the statute must be complied with'. There Reed J said that 'the objections to the appeal are well founded, and that the appeal should be dismissed'.

In Crowe v McWatt (Vol.XXXIII – Invercargill N.Z. 1913) a similar issue was raised, namely, whether the appellant has complied with the provisions of s303 of the Justices of the Peace Act (similar to Or 37 r1 supra). There notice was given a day after the 7 days allowed. The Court (Williams J) held that:

the 'provisions of s303 are mandatory, unless compliance therewith is excused by reason of the default of the respondent, or unless the appellant after doing all in his power to comply with the section, is prevented from so doing by the absence or conduct of the Magistrate'.

Williams J said that 'this Court has no general jurisdiction to dispense with the provisions of the statute'. The Court said that 'the matter is one involving an important principle, and I am afraid that I have no jurisdiction'.