

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 131 of 2019

BETWEEN: **LAWRENCE CAKAU** of Lot 72, Ratu Dovi Road Nadera.

1ST APPELLANT

SOKOVETI CAKAU of Lot 72, Ratu Dovi Road Nadera.

2ND APPELLANT

AND: **TORIKA NASILASILA WAQAIRAWAI** as sole Executor and Trustee of the
Estate of the late **JOANA RAILALA CAKAU** a.k.a **JOANA CAKAU** a.k.a **JOWANA**
RAILALA of Bukshi Street, Samabula, Suva, Bank Officer.

RESPONDENT

BEFORE **:** **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Betakula I - For the Appellants**

Ms. Tikoisuva N o/i of Shekinah Law- For the Respondent

DATE OF DECISION: 03rd March, 2023 @ 9.30am

DECISION

*[Notice of Motion to amend the Notice of Inter-Parte Summons of 1st and 2nd Appellants to add the Appellants
Grounds of Appeal and adduce fresh Evidence to the Appellants Notice of Inter-Parte Summons filed on 07/01/22]*

Introduction

1. On 07th January 2022, the 1st and 2nd Appellants filed a Notice of Inter-Parte Summons and sought for the following orders:-

- (i) That the Appellants be allowed to extend the time of Appeal of the Order pronounced on 05/03/20 by Acting Master in Civil Action No. HBC 131 of 2019,
- (ii) That the Appellants shall within 21 days of the filing of the Notice of Appeal, file and serve Summons returnable before a Judge for directions and hearing of the Appeal.

Upon the grounds set forth in the Affidavit of SOKOVETI CAKAU filed herein.

2. However, subsequent to the Notice of Inter-Parte Summons filed on 07th January 2022, the 1st and 2nd Appellants filed another Notice of Motion on 25th February 2022 to Amend the Inter-Parte Summons already filed on 07th January 2022 and sought for the following additional orders:

- (i) That the Appellants be allowed to add their grounds of Appeal and to adduce Fresh Evidence to the Appellants Notice of Inter-Parte Summons filed on 07/01/22 against the Order pronounced on 05/03/20 by Acting Master on Civil Action No. HBC 131 of 2019.

Upon the grounds set forth in the Affidavit of SOKOVETI CAKAU filed herein.

3. In totality, the 1st and 2nd Appellants altogether sought for Four (4) orders in their Notice of Motion therein as follows:-

- (a) The Extension of time to Appeal the Order of 05th March 2020 delivered by the Master of the High Court.
- (b) The Appellants to file and serve their Notice of Appeal within 21 days.

- (c) The 1st and 2nd Appellants be allowed to add their grounds of Appeal; and
 - (d) To adduce further Fresh Evidence to the Appellants Notice filed on 07th January 2022 against the order of 05th March 2020.
4. The applications hereinabove are made pursuant to *order 59 Rule 10, Order 59 Rule 17 and Order 20 Rule 5 (1) of the High Court Rules 1988 and the inherent Jurisdiction* of this Honourable Court accordingly.
5. The issue here is '*whether the 1st and 2nd Appellants had filed their Notice of Appeal as was required of them in terms of the timeframe stipulated by Order 59 Rule 9 of the High Court Rules, 1988 and whether the Appellants are now seeking the enlargements of time period for filing and serving a Notice of Appeal within the time period*' in terms of *Order 59 Rule 10 of the High Court Rules, 1988.*

Analysis and Determination

6. **Order 59 rule 10** provides;
 - (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 the expiration of that period.*
 - (2) *An application under paragraph (1) shall be made by way of inter-parte summons supported by an affidavit."*
7. It will be noted herein that the 1st and 2nd Appellants failed to file any Notice of Appeal against the Master's Judgment delivered on 5th March 2020 within the 21 days' time frame as stipulated in *Order 59 Rule 9 of the High Court Rules 1988.*
8. Therefore, if the 1st or 2nd Appellants did not file any Notice of Appeal in terms of *Order 59 Rule 9 of the High Court Rules 1988*, then they may make an application for an enlargement of time in terms of *Order 59 Rule 10 (1) of the High Court Rules, 1988* accordingly.

9. Once if the Notice of Appeal was filed, within the given time frame allocated in the ***High Court Rules 1988***, then there would have been no issue of enlargement of time to file a Notice of Appeal regarding the decision of the Master delivered on 05th March 2020.
10. The Master’s Judgement was delivered on 05th March 2020 and no Notice of Appeal was filed by the 1st and 2nd Appellants against the Judgment of the Master within the stipulated time frame in the High Court Rules.
11. In absence of any Notice of Appeal herein, the 1st and 2nd Appellants are seeking for the “*Extension of the time of Appeal*” instead of *enlargement of time period for filing and serving a Notice of Appeal*” in terms of *Order 59 Rule 10, [O,59 R 10] of the High Court Rules, 1988*.
12. Reference is made to *Order 59 Rule 17 of the High Court Rules, 1988* which sets out the ***procedural aspect of the filing of an Appeal*** against the Master’s Judgment.
13. However, the Rule was not complied with by the 1st and 2nd Appellants and hence in terms of *Order 59 Rule 17 [O59, R 17]*, the appeal is deemed to have been abandoned if the said Rule has not been complied with. [*O 59, R 17(3)* refers].

Delay

14. Further, the Judgement by the Master was delivered on 05th March 2020 and the 1st and 2nd Appellants filed their first Inter-Parte Summons some 2 years later on 07th January 2022 and subsequently filed a second Notice of Motion to Amend the first notice of Inter Parte Summons filed on 07th January 2022 to seek addition of Grounds of Appeal and adduce Fresh Evidence.
15. The delay in filing the Inter-Parte Summons has been explained by the 2nd Appellant to the Court. The 2nd Appellant stated in her affidavit that she was aware that the time to appeal the Master’s decision had lapsed. However, she was served late with the master’s orders late (annexure C refers). She further stated that she was not heard by the master on 05th March 2020 and were unaware of the hearing since they were not served with any notices.

16. However, the explanation tendered by the 2nd Appellant is unsatisfactory and unacceptable to this court since the set down court rules must have been adhered to and complied with and not to be defied the same unnecessarily.
17. This court also notes from the court record that both Appellant (Defendants) never appeared in Court after service of the initial Originating Summons and the adjournments thereafter until the Decision was finally delivered by the Master on the substantive Originating Summons on 05th March 2020 accordingly.
18. Hence, I find that the *delay is inordinate* on the part of the 1st and 2nd Appellants.

In Conclusion

19. There is no notice of Appeal filed and this court has no Appeal on foot.
20. Therefore, there is no opportunity for the 1st and 2nd Appellants to seek the “*Extension of time*” if the Appeal is already *deemed abandoned* in terms of *Order 59 Rule 17 of the High Court Rules 1988*.
21. Likewise, the second Inter-Parte Summons filed subsequently on 25th February 2022 and has nexus with the Initial Inter-Parte Summons filed seeking Amendment to add their Grounds of Appeal and adduce further evidence dated 07th January 2022 accordingly fails.

Costs

22. Both applications proceeded to full hearing.
23. It is only fair and appropriate that this Court accordingly grants a Summarily Assessed Costs against the 1st and 2nd Appellants at the total sum of \$750.

ORDERS

- (I) The 1st and 2nd Appellants Inter-Parte Summons filed on 07th January 2022 and subsequently on 25th February 2022 are accordingly dismissed.
- (II) The 1st and 2nd Appellants to pay the Respondent a total sum of \$750 as Summarily Assessed Cost.

Dated at Suva this 03rd day of March, 2023.



Vishwa Datt Sharma
JUDGE

CC: RAIKANIKODA & ASSOCIATES, SUVA
MESSRS SHEKINAH LAW, SUVA