

**IN THE HIGH COURT OF FIJI  
(WESTERN DIVISION) AT LAUTOKA  
CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 159 OF 2018**

**BETWEEN** : **MUSKET COVE RESORTS LIMITED** a limited liability company  
having its registered office at Dick’s Place, Malololailai, Fiji  
**RESPONDENT/ PLAINTIFF**

**AND** : **FRANK YEATES** retired person of Malololailai Island, Fiji  
**1<sup>ST</sup> APPELLANT/ 1<sup>ST</sup> DEFENDANT**

**AND** : **RESHMI NAICKER**  
**2<sup>ND</sup> APPELLANT/ 2<sup>ND</sup> DEFENDANT**

**BEFORE** : Hon. Mr. A. M. Mohamed Mackie

**APPEARANCES** : Mr. O’Driscoll, for the 1<sup>st</sup> and 2<sup>nd</sup> Appellant/ Defendants  
Mr. C.B. Young, for the Plaintiff/ Respondent

**WRITTEN SUBMISSIONS:** By the Appellants/ Defendants filed on 15<sup>th</sup> September 2022.  
No Submissions filed by the Respondent/ Plaintiff.

**RULING** : On 12<sup>th</sup> May 2023

**RULING**

**A. Introduction:**

1. This ruling is pronounced pursuant to the hearing held in relation to the Notice of Motion filed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/ Defendants (the Appellants) on 18<sup>th</sup> February 2021, seeking the reinstatement of their Appeal, which had been struck out on 12<sup>th</sup> February 2021 by my predecessor Hon. A.G. Stuart- J (as he then was) due to the absence of the Appellants’ Counsel and their failure to abide by the orders that had been made by his Ruling dated 4<sup>th</sup> December 2020.
2. Initially, my predecessor by his Ruling dated 4<sup>th</sup> December 2020 had extended the time period permitting the Appellants to file Summons for direction pursuant to Order 59 Rule 17 (2) of the High Court Rules 1988 (HCR) before the next date . However, as the Appellants’ Solicitors had failed to abide by the orders in the ruling, the Appeal (more correctly the 1<sup>st</sup> Application for reinstatement) was struck out as stated above.

3. The contents of paragraph 9 of the Ruling dated 4<sup>th</sup> December 2020 and the relevant orders made by the said Ruling are reproduced in paragraphs 4 and 5 below respectively for the sake of easy reference.
4. Paragraph 9 of the Ruling dated 4<sup>th</sup> December 2020 States as follows;

*“ In all circumstances, rather than require the parties to go to the expense and trouble of filing and responding to a formal application for reinstatement of the appeal, I am willing , in exercise of the courts discretion under O.2 , r.1 to extend the time for compliance , and to make consequential orders arising from that , to treat the applicant’s submissions on this issue as an application for reinstatement , **which is granted subject to the appellants making the necessary application for directions or a hearing at the next mention date as directed in the orders made at the conclusion of this judgment” (emphasis added )***
5. At the conclusion of the said Ruling dated 4<sup>th</sup> December 2020 , following orders, inter alia, were made;
  - i. *The time for the appellant to file a summons seeking directions under O, 59, r. 17 (3) is extended to the next date on which this file is called for mention. ( **the sub rule referred here should be (2) and not (3).***
  - ii. ...
  - iii. ....
  - iv. *The appeal is adjourned for mention before me on 12<sup>th</sup> February 2021 at 10.30 am for the directions and allocation of a hearing date for the appeal.*
6. It is to be observed that by Ruling dated 4<sup>th</sup> December 2020, what my predecessor had ordered was not for the reinstatement of the Appeal *per se*, but for the extension of time for filing of the Summons for direction, acting in his discretion pursuant to O.2, r.1 of the High Court Rules 1988 (HCR). As the order in the Ruling was not complied with by the Appellants’ Solicitors, the time extended by the said Ruling expired on 12<sup>th</sup> February 2021.
7. It is undisputed that the Appeal initially being abandoned due to the failure of the Appellants to act under Order 59 Rule 17 r 2 of the HCR, it was sought to be reinstated before my predecessor, without even making a formal Application, when he was considering some other Applications.
8. Accordingly, my predecessor by his Ruling dated 4<sup>th</sup> December 2020 granted reliefs, *inter-alia*, extending the time to file and serve Summons for directions as stated in paragraphs 4 and 5 above. However, since no summons for direction was filed and served as per the direction made in the Order the Appeal, in my view, has continued to remain abandoned.
9. It was at this juncture, the 2<sup>nd</sup> Application was made by the Notice of Motion dated 18<sup>th</sup> February 2021, seeking to reinstate the Appeal for the second time, on the grounds

averred in the Affidavit in support for their failure to abide by the order to file and serve Summons for direction within the time so extended.

10. However, the only task before me now is to decide whether the Appeal that remains still abandoned can be reinstated by considering the 2<sup>nd</sup> Notice of Motion at hand. It is not my duty here to delve into the reasons adduced for the failure on the part of the Appellants' Solicitors to file and serve Summons for direction. Because, the time extended by the Ruling has now expired. There is neither an Appeal on foot now nor an Application before me for **further extension of time**. Hence, I will consider only whether the Appeal that stands abandoned can now be reinstated on the new Application pending before me.
11. Hearing into the Notice of Motion was held before me on 19<sup>th</sup> August 2022 in consolidation with the action No. HBC -236 of 2018, wherein the Plaintiff/ Respondent ("the Respondent") hereof, MUSKET COVE, is the 1<sup>st</sup> Defendant, PINE LIMITED is the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> named Appellant FRANK YEATES, is the Plaintiff.
12. Subsequent to the oral hearing, only the Appellants have filed their written submissions in this matter. Learned Counsel for the Respondent Mr. C. B. Young, by relying on the written submissions filed in the said connected matter HBC 236 of 2018 , maintained the position that in the event the Strike out Application in action No-236 of 2018 succeeds; no necessity will arise to proceed with this matter for reinstatement. However, for the sake of completeness, I decided to write a separate ruling on the merits of the Application hereof.

## **B. Brief Background.**

13. The Respondent on 27<sup>th</sup> July 2018 commenced proceedings against the Appellants pursuant Section 169 of the Land Transfer Act, seeking reliefs, inter-alia, to have them evicted from the Land and premises in suit.
14. After hearing both the parties through their respective counsel and entertaining written submission, the learned Master (the Master) on 24<sup>th</sup> July 2020 pronounced his Ruling and ordered the Appellants to vacate the premises immediately and to pay the Respondent a sum of \$3,000.00 being the summarily assessed costs.
15. Being dissatisfied of the above ruling, the Appellants on 12<sup>th</sup> August 2020 filed Notice of Appeal and Grounds of Appeal, which was followed by the Appellant's Notice of Motion for Stay Pending Appeal filed on 21<sup>st</sup> August 2020. At the same time, the Respondent also had filed Application for leave to issue writ of possession, which was finally granted by the said Ruling of my predecessor. All the Applications being taken up for hearing on 12<sup>th</sup> October 2020 before my predecessor , the matter was adjourned to be mentioned on 23<sup>rd</sup> November 2020 "**for decision to be given if available**" as per his minutes.
16. Accordingly, when the matter was to be mentioned on 23<sup>rd</sup> November 2020, since my predecessor was apparently not sitting on that day, the matter was rescheduled to be

mentioned on **19<sup>th</sup> February 2021**, about which date Solicitors / counsel for both the parties had taken notice by being present in Court on 23<sup>rd</sup> November 2020.

17. However, it is further observed through the record, that the Ruling being made available by my predecessor prior to 19<sup>th</sup> February 2020, a notice being issued by the Registry to both parties' Solicitors on 03<sup>rd</sup> December 2020, the same was pronounced on 4<sup>th</sup> December 2020 by Mohamed Ajmeer –J. (Vide minute's sheet dated 4<sup>th</sup> December 2020). As directed in the Ruling, Mohamed Ajmeer –J adjourned the matter to be mentioned **12<sup>th</sup> February 2021**.
18. Accordingly, when the matter came up before Hon. A.G. Stuart –J on 12<sup>th</sup> February 2021, as per his direction in his Ruling, since the Appellants were neither present nor represented, and having found that the Summons for direction under Order 59 Rule 17 (2) had not been filed by the Appellants' Solicitors, following order was made.

**Order.**

***"No appearance to defendant, who has not applied for directions on appeal as described in decision on 04.12.2020. No steps have been taken by defendant since then. Appeal is struck out. Defendants ordered to pay costs of \$500.00"***

19. It is after the said order; the Appellants on 18<sup>th</sup> February 2021 filed their 2<sup>nd</sup> Application by way of Notice of Motion at hand seeking the reinstatement of the Appeal. This Motion was supported by an Affidavit sworn by Aliti Tinai on 16<sup>th</sup> February 2021 filed, together with annexures marked as "A" to "G".

**C. The Issue at Hand:**

20. The only issue before me now is whether the Appellants' Appeal that is deemed to have been abandoned could be reinstated as moved by the current Notice of Motion filed on behalf of the Appellants.

**D. The Law.**

21. The relevant rule that applies to the matter at hand is O.59, r.17 of the HCR, which provides:

"Procedure after filing appeal (0.59. r17),

17.-(1) *the Appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such Service.*

*(2) The Appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.*

***(3) If this rule is not complied with, the appeal is deemed to have been abandoned." (Emphasis provided)***

22. In ***Gay v Resolution Trust Corporation [2010] FJHC 268; BHA01, 2009 (26 February 2010)***, His Lordship Calanchini J (as he then was) said at page 10 in respect of an appeal in which the Appellant failed to file and serve a summons for directions within 21 days.

*“Under Rule 17(2) the appellant were required to file and serve a summons for directions within 21 days of filing the Notice of Appeal. Since the Notice of Appeal was filed on 28th April 2009, the Summons for directions was required to be filed by 19 May 2009. It was accepted by the parties that the summons for directions was not filed until 11 June 2009. Counsel for the appellants sought to give an explanation from the bar table concerning the closure of the registry following the events of early April 2009. However there was no affidavit material before me setting out any relevant facts as to how and when this affected the appellants and any attempts made to file such summons between 1 May 2009 when affidavit of service was accepted for filing and 11 June 2009 when the summons was filed.*

*The Rules in Part II of Order 59 have imposed a strict timetable for the filing and serving of documents at the Registry and on the Respondents. The purpose of the Rules was obviously to avoid delay at the interlocutory stage of civil proceedings and to make such appeals more efficient. The provision in Rule 17(3) that failure to follow Rules 17 (1) and 17 (2) leads to an automatic abandonment of the appeal is intended to operate as deterrence in respect of delay...*

***As a result I find that the appeal is deemed to have been abandoned under Rule 17 (3) as a result of non-compliance with Rule 17 (2)...”(Emphasis provided)***

23. In ***Deo v Ascot Motors Proprietary Ltd [2011] FJHC 782; Action 331.2008 (18 November 2011)***, where the Plaintiff sought leave to appeal the Master’s decision made striking out the action pursuant to Order 25 Rule 9 and the Defendant sought an order that the Plaintiff’s appeal from a decision of the Master be deemed abandoned under Order 59 Rule 17 (3) of the High Court Rules, once again His Lordship Calanchini J (as he then was) said at pages 2-4:

*“The effect of the rule [O 59, r 17] is that if the appellant does not file an affidavit within 7 days of service or does not file and serve a summons within 21 days of filing of his notice of appeal, he is deemed to have abandoned his appeal.*

*In this case the affidavit required under Order 59 Rule 17(1) was filed on 31 August 2011 and therefore was filed within the required seven days.*

*However, the summons required under Rule 17 (2) whilst filed on 14 September was not served on the Second Defendant until 26 September 2011. The summons was required to be served no later than 13 September 2011. It was as a result out of time by 13 days.*

*Rule 17 is quite clear. Under those circumstances the appeal is deemed to be abandoned. In civil litigation, abandonment is taken to mean the relinquishing of the whole or part of a claim in an action or in an appeal. The appeal is therefore deemed to have been abandoned by the appellant. There is now no longer any appeal in existence. **This result***

*is an automatic consequence that is prescribed by the rule with no second chance. (Emphasis added)*

*Counsel for the Plaintiff referred the Court to an interlocutory decision in **A Mitchell Gay and Another –v- Resolution Trust Corporation and Others** (unreported civil appeal HBA 01 of 2009 delivered 26 February 2010). During the course of that decision I made an observation, when dealing with a similar situation, that there was no explanation in the affidavit material to explain the failure to comply with Order 59 Rule 17 (2). To the extent that the comment may be taken to indicate that such an explanation, if reasonable could alleviate the consequence of non-compliance, then the comment should be disregarded as it was misleading. Whilst draconian, the consequence mandated by Rule 17 (3) for non-compliance with either Rule 17 (1) or Rule 17 (2) of Order 59 is final and absolute.*

*Whether there is any jurisdiction vested in the Court to entertain an application to re-instate the appeal has not yet been decided and there is no such application presently before me. I have some doubt as to the existence of a power to re-instate an abandoned appeal.*

*Nor do I, in this application, find it necessary to make any comment on what may be the outcome in the event that the Plaintiff should seek to commence afresh the appeal proceedings under Order 59.*

*Finally, counsel for the Plaintiff urged the Court to exercise its inherent jurisdiction to extend the time for the service of the summons. In my judgment the exercise of such discretion is not available in circumstances when the appeal has already been abandoned and as a result of which there is no appeal on foot in respect of which discretion could be exercised. Furthermore there was no application to that effect before the Court.*

*For all of the above reasons the application by the Second Defendant is granted. I order that the appeal be deemed abandoned in accordance with Order 59 Rule 17. I do not consider that such an application was necessary as Rule 17 (3) provides for the consequences of non-compliance as a matter of course. There was no requirement for the Second Defendant to do anything further once the Plaintiff had failed to comply with Order 59 Rule 17 (2) ...” (Emphasis provided)*

**E. Discussion:**

24. The Notice of Motion at hand for the reinstatement of the Appeal arises as a result of the failure on the part of the Appellant’s Solicitors to file Summons for direction as stipulated by the said Ruling dated 4<sup>th</sup> December 2020.
25. The Appellants by making their purported 2<sup>nd</sup> Application for the reinstatement of Appeal, have tacitly admitted that there is no an Appeal on foot now. The Appellant’s Appeal that was deemed abandoned, still remains abandoned.

26. Further, by the relief (i) granted as per the Ruling dated 4<sup>th</sup> December 2020 , the time period was extended for the Appellants to file and serve their Summons seeking direction before the next date , which according to the Ruling was 12<sup>th</sup> February 2020.
27. The Appellants, who did not make use of the extended time period by the said Ruling, are now making the 2nd Application for the reinstatement.
28. As per the relief (IV) of the Ruling, it had been stated that the matter is adjourned for mention before him on 12<sup>th</sup> February 2021 at 10.30 for giving direction and allocation of a hearing date of the Appeal. As per the Ruling, it is observed that the Appellants were at liberty to file the Summons for direction on or before 12<sup>th</sup> February 2021 for them to get direction on the said date.
29. But the Appellants did not file and serve the summons for directions as per the ruling, except for filing a draft copy of the Summons dated 16<sup>th</sup> February 2021 marked as "F" along with the Affidavit filed in support of their Notice of Motion filed on 18<sup>th</sup> February 2021.
30. Rule 17 (2) mandates that the Appellant must, within 21 days of the filing of notice of appeal, file and serve summons returnable before a judge for directions and a date for the hearing of the appeal. This time period in this matter was extended by the Ruling of Stuart –J dated 4<sup>th</sup> December 2020, for them to have it filed and served on or before 12<sup>th</sup> February 2021. The Appellants had been given 2 months and 8 days to file their Summons for direction. Still they failed to abide by the orders of the ruling and now face the consequences.
31. As stated above, I need not examine the propriety of the reasons adduced for the failure on the part of the Solicitors for the Appellants to file and serve the Summons for direction within the time extended. Because my task hereof is to decide on the 2<sup>nd</sup> Application for reinstatement. However, I shall go into the propriety of those reasons as the Appellants' Counsel appears to be finding fault with a member of Staff at the Registry for the alleged failure to call back the defendants' Solicitors to confirm the next date and for non-inclusion of the matter in the cause list for 12<sup>th</sup> February 2021.

**Is the Reason adduced for failure acceptable?**

32. The reasons adduced by the Appellants' Counsel to justify the failure are (1) That they were under the impression that the matter was to be mentioned only on 19<sup>th</sup> of February 2021, (2) That a Staff at the Registry failed to confirm the next date, (3) The cause list for 12<sup>th</sup> February 2021 did not include this case for that day, and (4) That it was in the cause list for 19<sup>th</sup> February 2021 this matter had been included.
33. It is to be observed that after the hearing before my predecessor on 28<sup>th</sup> October 2020, no specific date had been given for Ruling, except for directing the matter to be mentioned on 23<sup>rd</sup> November 2020 for the Ruling to be delivered, if it was available. On

23<sup>rd</sup> November 2020, my predecessor, apparently, being on leave, the matter was fixed to be mentioned on 19<sup>th</sup> February 2021.

34. However, the ruling being ready prior to the said date, after giving notice to both the Solicitors on 3<sup>rd</sup> December 2020, it was pronounced by Ajmeer – J. on 4<sup>th</sup> December 2020 and the matter was fixed to be mentioned on 12<sup>th</sup> February 2021, as directed in the Ruling itself, to see the compliance and to fix a date for hearing of the Appeal.
35. As such , there was no necessity for the matter to be mentioned on 19<sup>th</sup> February 2021 as per the earlier direction, since the mention date had been advanced to 12<sup>th</sup> February 2021. The Appellants’ Solicitors were aware of this. It was according to the previous arrangement this case had been included in the listed for 19<sup>th</sup> February 2021.
36. On 3<sup>rd</sup> December, 2020, the Appellants’ Solicitors were given due notice of the Ruling to be delivered on 4<sup>th</sup> December 2020, according to which **Mr. Heritage, on the instructions of the Appellants’ Solicitors, Messrs O’driscoll & Company, had appeared in Court on 4<sup>th</sup> December 2020** , who should have taken the notice of Ruling and about the next mention date ie; **12<sup>th</sup> February 2021**.
37. Now the Appellant’s Solicitors cannot be heard to say that they were under the impression that the case would be called only on the 19<sup>th</sup> February 2021 or pin the blame on the Staff at the Registry or on the correctness of the cause list. The Appellants were duly represented in Court on 4<sup>th</sup> December 2020 when the Ruling was pronounced and the next date was fixed for **12<sup>th</sup> February 2021**. Further, the ruling itself had clearly stated that the matter will be mentioned on 12<sup>th</sup> February 2021 and not on 19<sup>th</sup> February 2021.
38. The Appellants are not entitled to rely on their aforesaid grounds to cover up their failure to abide by the Ruling pronounced on 4<sup>th</sup> December 2020 requiring their compliance to prosecute the intended Appeal. The Appeal still remains abandoned, as a result of which there is no Appeal on foot for reinstatement. The 2<sup>nd</sup> Application before me now is for reinstatement and not for the extension of time to file Summons for direction. There is no specific provision for reinstatement of Appeal that is deemed to have been abandoned.

**Application for Reinstatement:**

39. In relation to an Application for reinstatement of an Appeal, which is deemed to have been abandoned, I am inclined to follow Hon. Leon Seneviratne- J in his decision in **Vermande v Daveta [2019] FJHC 371; Civil Action 3 of 2018 (24 April 2019)**

*[8]... the delay is in fact on the part of the solicitors of the defendant who failed to file the notice and grounds of appeal within the period prescribed by law. The delay may not be long but when a party fails to file and serve the notice and grounds of appeal within the prescribed period that appeal is deemed to have been abandoned. The defendant,*



therefore, is not entitled to fault the registry for the delay in filing the notice and grounds of appeal.

[9] The next issue for determination is whether the court has power to reinstate an appeal which is deemed to have been abandoned under Order 57 rule 19 of the High Court Rules 1988. In my view once an appeal is abandoned there is no appeal on foot to reinstate. In the case of **Deo v Ascot Motors Proprietary Ltd [2011] FJHC 782; Action 331.2008 (18 November 2011)** Justice Calanchini said whether there is any jurisdiction vested in the Court to entertain an application to re-instate the appeal has not yet been decided.

[10] The learned counsel for the appellant in support of the application for reinstatement of the appeal which is deemed to have been abandoned cited the following decisions of Justice Ajmeer allowing applications for reinstatement:

*Sarojini v Native Land Trust Board [2016] FJHC 1018; HBC230.2000 4 November 2016)*  
*Radhabai v Singh [2018] FJHC 779; HBC172.2015 (20 August 2018)*

[11] In arriving at the conclusion that the court has power to reinstate an appeal which is deemed to have been abandoned Justice Ajmeer relied on some Australian decisions where such reinstatements have been allowed.

[12] In *Sarojini v Native Land Trust Board (supra)* the court cited the decision in *Bele & Vaughan (No. 2) [2012] Fam CAFC 125 (21 August 2012)*. It appears from the decision in the said case the Australian Court has gone on the basis that the court has discretion to reinstate an appeal which is deemed to have been abandoned.

[13] High Court Rules 1988 does not confer discretionary power on the court to reinstate appeals which are deemed to have been abandoned. There are instances where the legislature has provided for extension of time when a party fails to do an act within the period prescribed by a statute. The legislature in this instance in its own wisdom has thought it is not proper or necessary to make provisions allowing an appellant who fails to comply with Order 59 rule 17 of the High Court Rules 1988, to make an application for the reinstatement of his appeal which is deemed to have been abandoned.

[14] The court cannot introduce new provisions of law to statutes and also the court cannot confer powers which are not provided for by the statute, on it. That is the duty of the legislature. If there was provision for the reinstatement of appeals which is deemed to have been abandoned the court can always be guided by the previous decisions in the exercise of its discretionary power. For the reasons set out above I cannot agree with the decisions of Justice Ajmeer in the two cases cited above.

[15] I am therefore of the view that the court has no power to reinstate an appeal which is deemed to have been abandoned. The defendant who abandons his appeal is not without a remedy. If the appeal is deemed to have been abandoned under order 59 rule 17 of the High Court rules 1988 the defendant if he so wishes can make an application for extension of time.

**F. Conclusion**

40. Accordingly, this Court decides that the Notice of Motion filed on 18<sup>th</sup> February 2021 for the reinstatement of Appeal should fail. The Appeal will continue to stand abandoned. Further, the reason adduced by the Solicitors for the Appellants for their failure to file the Summons for direction, as required by the ruling dated 4<sup>th</sup> December 2020, should also necessarily fail. I find it is justifiable to make an order for the Appellants to pay a sum of \$2,500.00, (Two Thousand Five Hundred Dollars) being the summarily assessed costs to the Respondent.

**G. Final Outcome:**

- A. The Notice of Motion filed by the Appellants on 18<sup>th</sup> February 2021, seeking to reinstate the Appeal is hereby struck out.
- B. The Appeal by the Appellants is deemed to have been abandoned.
- C. The Notice of Appeal and the grounds of Appeal are hereby struck out.
- D. The Appellants shall pay the Respondent a sum of \$2,500.00 (Two Thousand Five Hundred Dollars) being the summarily assessed Costs.



  
A.M. Mohamed Mackie  
Judge

At the High Court of Lautoka on this 12<sup>th</sup> day of May, 2023.

**SOLICITORS:**

For the Appellant

O'Driscoll & Co – Barristers & Solicitors.

For the Respondent:

C. B. Young & Associates – Barristers & Solicitors.