

N THE HIGH COURT OF FIJI
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBC 138 of 2021

BETWEEN: **NAGARAJU THANDU** of Auckland, New Zealand.

PLAINTIFF

AND: **RAJNAL ROHINESH KUMAR** of Lot 204, Vuci Road, Nausori.

FIRST DEFENDANT

AND: **PARMESHNI LATA** of Lot 204, Vuci South Road, Nausori.

SECOND DEFENDANT

Date of Hearing : 11 April 2024
For the Plaintiff : Mr Singh. R
For the Defendants: Ms. Singh. M
Date of Decision : 29 April 2024
Before : Ms. Waqainabete-Levaci, SLTT, Puisne Judge

RULING

(APPLICATION FOR DECREE NISSI TO BE HEARD AND DETERMINED)

PART A – BACKGROUND AND AFFIDAVITS

1. The Plaintiff has filed an application by ex parte summons seeking to be heard on an application that the Decree Nisi be made absolute.
2. The Court had directed Counsel to serve the Summons and the matter be treated inter-parte.
3. The Plaintiff filed their Affidavit in support and the matter was affixed for Hearing after the Defendant also appeared in Court.

4. This application stems from a ruling of the Court granting leave to appeal and stay of proceedings pending appeal against the decision of my predecessor and brother judge which was made on 9 September 2022.
5. The Defendants failed to file their Appeal within 21 days or 42 days thereafter.
6. The Defendants has consented to liability against them. A sum of \$242,179.00 was advanced by the Plaintiff to the Defendant which has not been refunded.
7. The Plaintiff seeks to pursue their claim by seeking a hearing for the Decree Nisi to be made absolute.

PART B: SUBMISSIONS BY THE PARTIES

8. The submission by the Applicant is that Leave to appeal was granted to Defendants on 7 December 2023 and as no appeal was filed within the timelines, the appeal is lapsed and seek to have the Decree Nisi granted absolute. The Defendants had more than a year to file their appeal which they failed to do. They have recently filed an application to enlarge time with Court of Appeal thereby conceding that their time to Appeal on the initial application has lapsed.
9. The Respondent submitted that Stay pending appeal was granted and they had attempted to file their Appeal but was deemed out of time by 10 to 11 days. Their date before the Court of Appeal for their application for leave to appeal out of time is 7th of May.
10. In response the Applicant contends that stay was granted pending leave to appeal out of time be also granted. The appeal has not be filed and hence no stay should remain. There was no leave granted initially and they are now asking for leave. There is nothing to show opposition for Decree Nisi to become Absolute.

PART C: LAW AND ANALYSIS

11. The Plaintiff relies upon Rule 16 of the Court of Appeal rules that provides:

“Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated form the date on which the judgment or order of the Court below was signed, entered or otherwise perfected) that is to say –

- (a) In the case of an appeal from an interlocutory order, 21 days;

(b) In any other case, 6 weeks.”

12. Rule 34 of the Court of Appeals Rules provides that a filing of an appeal does not operate as a stay and that all applications for stay should first be heard in the Court below.
13. Rule 4 of the Court of Appeal Rules requires that all applications for appeal, or leave to appeal or leave for extension of time be filed with the High Court Registry in Suva.
14. Rule 27 of the Court of Appeal Rules states that any application for extension of time may be made by the High Court upon an application being made before the expiration of that period.
15. The Court had granted Leave to Appeal out of time from 7 December 2023. If 21 days were to be counted and since this judgment was interlocutory, the period would have lapsed on 28 December 2023. No document were filed by then.
16. In any event if the Defendant were to argue that this was a final judgment and that 42 days was the period to file their Appeal, the time would lapse on 18 January 2024.
17. No Appeal was filed by then.
18. In Singh -v- Kuar [2018] FJCA 46; ABU 104.2017 (7 May 2018) Chandra RJA held that:

[20] In considering the bona fides of the Appellant in the prosecution of the appeal, it is observed that the Appellant has taken all necessary steps to prosecute his appeal. However, it has to be seen whether the appeal is one which is arguable. Justice Calanchini in New World Ltd -v- Vanualevu Hardware (Fiji) Ltd [2015] FJCA172; ABU76.2015 (17 December 2015), at paragraph 16 stated:

“The respondent’s principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This court is required to consider the bona fide of the appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that the merits of the appeal will rarely be considered in any detail it is usually sufficient if an appellant has an arguable case. If the appeal is obviously without merit and has been filed merely to delay enforcement of the judgment then the application should be refused.”

19. Therefore it is suffice to say that there must be a bona fide prosecution of the appeal by the Appellant in order to show this Court they have a serious question to be tried for which requires that the stay remain afoot.
20. Given that they did not file their Appeal within the requisite timelines given that the Court had already granted Leave to Appeal out of Time and Stay pending Appeal, it reflects poorly on them and confirms that there is no such prosecution on foot.
21. Since the Appeal was not on foot, would stay continue or would it also lapse if an application for Leave to Appeal out of Time is made in the Court of Appeal?
22. In cases where the Respondent/Defendant have not complied with Registrar's directions giving timelines, a non-compliance certification by Registrar renders the Appeal abandoned (see Trustees of South Seas Club -v- Chung Lee [2023] FJCA 88; ABU 017.22 (2 June 2023) Jitoko VP and the Court of Appeal had to reinstate the Appeal, setaside the non-compliance certificate as well as grant stay pending appeal on the merits of the Appeal.)
23. The basis of the Stay was pending the Appeal. In this instance since the Respondent/Defendant has not pursued filing the documentations for an Appeal within the requisite timelines, no appeal is afoot. Hence stay is not effective and lapses after the timeline required for an Appeal.
24. The Court therefore finds that the Applicant/Plaintiff is correct in this instance.
25. The Court will therefore grant orders and costs will be costs in the cause.

Orders of the Court:

26. The Court orders as follows:

- (a) *That the Court will affix this matter for Hearing of the Application for Decree Nisi to become absolute;*
- (b) *Costs in the cause.*



Ms Senileba LTT Waqainabete-Levaci

Puisne Judge