IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA **APPELLATE JURISDICTION**	
ACTION NUMBER:	**Family Appeal # 8 of 2020** **Magistrate's Court File # 14/LTK/0300**
BETWEEN:	**PAISLEY** **APPLICANT**
AND:	**AASIF** **RESPONDENT**
Appearances:	**Applicant – Present – Mr R. Naidu (**Naidu Lawyers). **Respondent – Not Present – Mr R. Kumar** (Roneel Kumar Lawyers).
Date of Hearing	Thursday 1 February 2024
Date of Judgment	Tuesday 9 March 2024
Coram:	Hon. Mr. Justice Chaitanya Lakshman
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.*

Ruling

A. Introduction

[1] On 20th July 2023 the Applicant/Lady filed an Application (Form 12) seeking the following orders:

> *"1. An Order that the Order made on 12 February 2021 and 26 February 2021 striking out the Applicants Appeal be set aside.*

2. *An Order that the Applicants Appeal (Form 26) be reinstated.*

3. *An Order that the time fixed by Order of 12 February 2021 for the uplifting and finalization of the Court documents necessary for the appeal record be extended 14 days or such other date as the Court shall think fit, if necessary.*

4. *Such other order maybe made in the premises as shall be just."*

The Application was filed with an Affidavit in Support (Form 23) of the Applicant/Lady.

[2] A Response (Form 13) was filed on behalf of the Respondent/Man on 22nd August 2023. He sought the following:

"1. *That the Applicant Lady's application be struck out as it is abuse of the court process.*

2. *That the Applicant Lady be ordered to comply with the Magistrates Court Order made on the 28th day of February 2020.*

3. *Any other order that this court deems just and fair*."

The Respondent/Man filed an affidavit with the Form 13. An affidavit in reply was filed by the Applicant/Lady on 12th September 2023.

B. Brief History

[3] A judgment on property distribution between the parties was delivered by the Learned Resident Magistrate on 28th February 2020. The Applicant/Lady filed an appeal on 27th March 2020. The Respondent/Man filed his notice of appeal on 24th April 2020. An amended notice of appeal was filed on 2nd July 2020. The matter was initially listed before Justice Wati. On 21st October 2020 it was called before Justice Nanayakkara. Both sides needed further time to finalise copy records. On 12th February 2021 Justice Nanayakkara gave "*final 7 days to the appellant to uplift the documents necessary to argue the appeal. If not complied, the appeal will be struck out*". On 26th February 2021 Justice Nanayakkara noted that "*the appellant has not complied with the unless order made on 12/02/2021. The court is not inclined to grant further time since no sufficient reason adduced for non-compliance. The appeal is struck out. Mr Kumar says he will be withdrawing the cross-appeal. Notice of discontinuance to be filed on or before 10/3/2021*."

[4] The orders of Justice Nanayakkara were appealed to the Fiji Court of Appeal by the Applicant/Lady. The Fiji Court of Appeal on 22nd June 2022 dismissed the appeal on the basis that the Applicant/Lady had not sought leave to appeal the decision of the High Court. On 11th August 2022 an application for leave to appeal out of time was filed on behalf of the Applicant/Lady in the Magistrates' Court. A Ruling was delivered on 15th June 2023 dismissing the application for leave to appeal out of time. The present application then follows.

C. The Submissions

[5] The application, response, the affidavits and the submissions have been noted. However, for ease of reference I would briefly summarise the submissions made in court and contained in the written submissions.

[6] The submission on behalf of the Applicant/Lady is on the following:

(a) Conduct of the applicant and making of the unless orders.
(b) Preparation of appeal records.
(c) Effect of Court of Appeal judgment of 22nd June 2022.
(d) Jurisdiction to set aside the unless (strike out order) and extend time for compliance of the Order of 12th February 2021.
(e) Jurisdiction to reinstate an appeal – relevant Statute Law and Rules.
(f) Reinstatement of appeal – relevant principles.
(g) Administration of justice.

[7] For the Respondent/Man the submission is on the following issues:

(a) Basis of application.
(b) The merits of the application
(c) Issues raised by the Applicant in her Affidavit in support.
(d) Prejudice to the Respondent.

I wish to commend Mr Naidu and Mr Kumar for the comprehensive submissions. When lawyers do their work efficiently, they make the Court's work easier. Decision making becomes easier when lawyers submit and cite relevant cases and laws.

D. Determination

[8] The application and the issue before me is one of **reinstatement of an appeal**. In setting out the history succinctly I only covered certain relevant issues. It does not mean that I have not seriously gone over the chronology of the events. I have also gone over the files and the materials which include the affidavits of the parties and the submissions. They all contain a lot of materials and information. I have perused them and considered everything.

[9] There is no dispute that the Applicant/Lady had filed a timely appeal. The Respondent/Man had later filed his grounds of appeal (cross appeal). Following the striking out of the Applicant/Lady's appeal, the Respondent/Man filed discontinuance of his appeal.

[10] The Family Law Act 2003 and the Family Law Rules 2005 does not have specific provision for the reinstatement of an appeal that has been struck out. For the Respondent, Mr Kumar raised that the application for reinstatement is an abuse of process as it did not have any legislative foundation. On this point I note that the Laws also do not specifically provide for the striking out of an appeal on unless orders. The Court relies on Rule 5.03 (b) of the Family Court Rules 2005 which gives it discretion as it "… *may give such directions with respect to the practice and procedure to be followed in the case as it considers necessary*" where there is difficulty or doubt as to matter of practice or procedure. In one of the following paragraphs I will look at local case authority which states that a court may reinstate its own orders without an appeal.

[11] Before moving on to deal with the main issue which is of the reinstatement of the appeal. I would like to be briefly look at the position with respect to unless orders. In **Marcan Shipping (London) Limited v. George Kefalas and Candida Corporation [2007] EWCA Civ 463** the United Kingdom Supreme Court stated that "*In order to ensure that its process is not subverted so as to become an instrument of injustice every procedural system must place at the disposal of the court the power to manage proceedings before it, if necessary, by imposing sanctions on litigants who fail to comply with its rules and orders. The ultimate sanction, of course, is to dismiss the claim or strike out the defaulting party's statement of case. A well-recognised way of imposing a degree of discipline on a dilatory litigant is to make what is known as an "unless" order by which a conditional sanction is attached to an order requiring performance of a specified act by a particular date or within a particular period."*

In **Samat v. Qelelai [2012] FJHC 844; HBC 201,2002L (30th January 2012)** which is a High Court interlocutory judgment it was stated that *"[13] fundamentally, courts are required to determine cases on merit rather than dismissing them summarily on procedural grounds. However, for better case management, the courts at times are required to exercise its inherent jurisdiction and make unless orders against parties who persistently default adhering to court orders. The court therefore makes unless orders requiring the defaulting party to comply with the order by a certain date and specify the consequence of the default….[27] It is well established principle of law that a Master, Magistrate or a Judge cannot revisit or amend its own orders unless such orders were made per incuriam. In my mind, there are at least three types of rulings, orders, or judgments in a case made by either a Master, Magistrate or a judge. i.e., (i) unless orders for procedural compliance; (ii) interlocutory or final orders, which are made on merit; and (iii) orders which are made in the exercise of statutory powers where matters are dealt summarily and not on merit….[29]* ***'Unless orders' that are made in the exercise of inherent powers of the court and solely for the purpose of compelling parties on procedural compliance are not made on merits. Therefore in my mind, an unless order made either by a Master, a Magistrate or a Judge exercising original or appellate jurisdiction can re-instate their own orders without appeal, and the court is not functus officio****."(My Highlighting)*

[12] Our family laws are modelled on the Australian laws. For case authorities we generally rely on the Australian cases for guidance. In **Bemert & Swallow [2010] FamCAFC 100 (11th June 2010)** the Family Court of Australia, following Gallo v. Dawson (1990) 93 ALR 479 set out that "*the overarching issues in considering an application for reinstatement is where the justice of the case lies, and in determining that there are a number of factors that need to be considered, such as any explanation for the failure to comply with the timeframes prescribed, in this case by order of the Appeals Registrar, the merits of the appeals, and the prejudice to the parties depending upon the result of the application.*"

I will now go over each issue in turn.

[13] The first issue is explanation for the failure. The applicant conceded that her lawyer failed to "uplift the documents necessary to argue the appeal" within 7 days as per the Court Order on 12th February 2021. The Applicant has shown to this court that on 11th January 2021 she paid $1263.90 for 1149 pages of the copy records. This was a month before the striking out orders were made. The records reveal that it was the

lawyers who did not perform their duties. They were acting for the Applicant. They needed to uplift the documents. The Applicant did her part by paying for the records. She is not at fault. The lawyers instead of filing for a reinstatement of the appeal filed an appeal in the Court of Appeal on 30th March 2021. The Court of Appeal dismissed the appeal on 22nd June 2022 stating that leave of the High Court should have been sought. On 22nd June 2022 an application was filed in the Magistrates' Court seeking leave to appeal the judgement of the Magistrate. On 15th June 2023 the leave to appeal was refused by the Magistrates' Court. This all consumed time. Time which was of essence to the parties.

[14] I find it necessary that I address the actions of the lawyers of the Applicant. Lawyers are paid by their clients to perform for them. Lawyers are paid for their work due to their knowledge and skills. The courts are divided on who is answerable for failures of lawyers. Some are of the view that a client is bound by the actions of their lawyers authorised to represent them. Clients hire lawyers to represent them diligently. Where lawyers fail to perform a task which he or she is paid for, the lawyer is failing in his or her duty. This is not what he or she is engaged for by the client. Lawyers cannot be allowed to get away for their failings. They are squarely answerable for their actions. It cannot be apportioned with the client. They are paid to perform. It was the responsibility of the lawyer of the Applicant to uplift the documents to argue the appeal. It should not be visited on the Applicant. It is not fair to bind the Applicant to the actions of her lawyer, especially where the lawyer is failing in his or her duty to the Applicant and the Court. From what is before me I find that the previous lawyers of the Applicant failed her miserably. The predicament of the Applicant is solely due to the previous lawyers who were representing her. Apart from picking up the documents, they filed improper applications in Court. Following the striking out of the appeal. They proceeded to the Court of Appeal. Then they returned to the Magistrate Court. All this was unnecessary. It cost money and took time. The money was paid by the Applicant. It also cost the Respondent. I note the Australian Family Court judgments in **Baghti & Bhagti and Ors [2014] FamCAFC 89** and **Molloy & Molloy [2016] FamCAFC 264** which discuss some of the points that I have raised here.

[15] The Applicant in this matter had prima facie appealed the orders of the Learned Magistrate. I note that appeal was filed in the time prescribed by the Rules and the grounds of appeal, on their face, demonstrate arguable grounds of appeal. I find that the interest of justice would favour granting an indulgence to the Applicant in order that she could fully ventilate her rights to appeal. On the evidence before me I am not satisfied that non-compliance was intentional, rather the records indicate that the Applicant's previous lawyer failed to diligently pursue the appeal by uplifting the documents to argue the appeal. There is no evidence before me that any non-compliance can be directly attributed to the Applicant. In terms of prejudice, both parties have submitted that they will suffer prejudice. The Applicant acknowledges that prejudice sits both ways. I am of the view that the matter should be decided on merits. The issues need finality. It is in the interest of justice for both the parties that the matter is determined on the merits and not on technicalities.

[16] I am in favour of what was stated **In re Jokai Tea Holdings [1992] 1 W.L.R 1196 by Sir Nicholas Browne-Wilkinson V,-C.,** at 1203B:

> "[*I*]*n my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But* ***if a party*** *can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed."*

I also find relevant what was said in **Jackamarra (an Infant) v Krakouer (1998) 195 CLR 516**, in particular the sentiments of Gummow and Hayne JJ at [33]:

> "..*[W]hen an appellant has instituted an appeal within time, if all other things are equal, the bare fact that the appellant has failed to take some interlocutory step within the time fixed by the rules would not be reason enough to shut that appellant out from the pursuit of the appeal unless it were clear that the appeal would fail. Of course, the qualification "if all other things are equal" is very important and it should not be permitted to obscure the fact that very often the fact that an appeal is pending may itself affect the respondent adversely in some way…"*

[17] Balancing all the relevant factors, I find that it would be appropriate to reinstate the appeal. The appeal needs to be determined on the merits. The fees for the documents have been paid for. The documents can promptly be uplifted and utilised for the appeal. In fairness to the Respondent, he had a cross-appeal. That was discontinued following the striking out of the appeal. The Respondent's is at liberty to have his cross-appeal reinstated. Strick timelines will be set in consultation with the parties and their lawyers so the matter is heard in a timely manner. There will be no order as to costs given the circumstances.

E. <u>Court Orders</u>

(a) Appeal is reinstated.
(b) No orders as to costs.

……..

Chaitanya Lakshman

Acting Puisne Judge