

IN THE SUPREME COURT OF FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Petition No: CBV 0013 OF 2023

[Court of Appeal ABU 51 of 2019]

[High Court HBC 196 of 2014]

BETWEEN : **MOHAMMED SHAFIQ**

Petitioner

AND : 1. **ANTHONY MARK VALENTINE**
2. **SHAINAZ ZAREENA BIBI VALENTINE**

Respondents

Coram : The Hon. Mr Justice William Calanchini, Judge of the Supreme Court
The Hon. Mr Justice William Young, Judge of the Supreme Court
The Hon. Mr Justice Isikeli Mataitoga, Judge of the Supreme Court

Counsel: Mr A. K. Singh for the Petitioner
Mr S. Singh and Ms K. Saumaki for the Respondents

Date of Hearing: 7 June 2024

Date of Judgment: 28 June 2024

JUDGMENT

Calanchini, J

Background Facts

[1] The parties entered into a sale and purchase agreement on 17 March 2014 (the agreement).
The Petitioner (Shafiq) agreed to sell property situated at Davuilevu and described as

being part of Lot 10 on DP NO. 6432 (CT 7722) comprising an area of 428 square metres in the Province of Rewa (the property). The purchase price was agreed at \$180,000.00. Under the agreement payment of the purchase price was to be effected at settlement. Settlement was to take place within 90 days from the date of signing of the agreement or on such other date as mutually agreed to in writing by the parties. The contract provided for a further 14 days for a party to rectify any default under the agreement.

[2] Shafiq's agent advised the purchaser (the Valentines) in writing by letter dated 11 July 2014 that Shafiq had withdrawn the property from sale since "*he has decided not to sell the property.*"

[3] On 15 July 2014 a writ of summons was issued out of the High Court on behalf of the Valentines. An amended statement of claim dated 30 July 2014 sought, amongst others, an order for specific performance of the agreement. On 2 July 2014 Shafiq filed his Statement of Defence. Among other issues raised in his Defence, Shafiq pleaded in paragraph 16 that he had invested more money in the property and the value of the property had increased.

Summons for Summary Judgment

[4] On 4 August 2014 the legal practitioners acting for the Valentines filed a summons for summary judgment under Order 86 Rule 1 of the High Court Rules. The summons was accompanied by a supporting affidavit sworn by Anthony Mark Valentine. Shafiq subsequently filed an answering affidavit. In a written judgment delivered on 28 May 2015 the Master granted the application for summary judgment and ordered specific performance of the agreement together with the necessary ancillary orders and costs.

Shafiq's Appeal

[5] On 11 June 2015 Shafiq filed a notice of appeal against the decision of the Master delivered on 28 May 2015. The notice was filed on the fourteenth day after delivery of the Master's judgment. On 23 August 2015 Counsel for Shafiq applied to withdraw the

appeal. The Master granted the application and ordered that the appeal be “*dismissed and struck out*” with no orders as to costs.

Further Directions

[6] It subsequently became necessary for the Valentines to seek further directions from the Master to give effect to the order for specific performance due to the existence of a mortgage over the property. Consequently a summons seeking the necessary orders was filed on 14 October 2015. Although the application was opposed, for reasons that are not entirely clear, Shafiq failed to file an opposing affidavit. On 9 December 2015, the Master, in an extempore Ruling, granted the orders “*as sought for*” in Counsel’s application dated 07/10/2015: “*1-10 inclusive.*”

[7] Further applications were filed by both parties. Initially, early applications came before the Master and the others subsequently before a Judge of the High Court. Unfortunately, for reasons that are not presently relevant, the litigation did not advance any further until orders were made by Kumar J (as he then was) on 23 August 2016.

High Court Proceedings

[8] When Shafiq’s application for an enlargement of time came before Kumar J on 23 August 2016, there was no appearance by Counsel for the Valentines. The learned Judge considered the material filed by Shafiq and proceeded to make the following ex parte orders:

“(i) *Appellant/Defendant is granted leave to file Appeal out of time the Master’s decision delivered on 28 May 2015;*

(ii) *Respondent to pay Appellant’s costs assessed in the sum of \$1,000.00 within 14 days.*”

[9] When Shafiq’s application for stay was called before Kumar J on 18 July 2017 the Court noted that Shafiq had not yet filed a notice of appeal pursuant to the leave granted on 23 August 2016. Consequently the Court ordered that:

“1. Summons for stay of execution and leave to appeal is dismissed and struck out.

2.”

[10] Pursuant to further applications made by Shafiq, Kumar J on 3 November 2017, delivered a detailed Ruling in which he outlined a number of occasions when Shafiq had failed to comply with the High Court Rules. In particular the Judge referred to the orders made on 23 August 2016 granting Shafiq leave to appeal the Master’s Ruling dated 28 May 2015. The Judge noted that Shafiq should have filed his notice of appeal by 30 August 2016, being 7 days after the granting of leave in accordance with Order 59 Rule 9(b) of the High Court Rules. The Judge also noted that Shafiq should have filed an application for leave to file a Notice of Appeal out of time on 3 August 2017 instead of filing a Notice of Appeal and Summons for Directions. The Judge concluded that Shafiq had abused the process of the Court and ordered that the Notice of Appeal and Grounds of Appeal dated 25 July 2017 and filed on 3 August 2017 be dismissed and struck out with costs in the amount of \$1,000.00 be paid to the Valentines.

[11] Shafiq filed an application for leave to appeal an earlier decision of Kumar J (to the Court of Appeal) under Rule 26(3) of the Court of Appeal Rules that came before Kumar J on 12 December 2017. The Judge gave directions for the service of the summons by 4.00pm on the same day, filing and the subsequent service of affidavits and the filing and serving of submissions. The matter was listed for hearing on 23 January 2018. When the matter was called before Kumar J on that date, Counsel for Shafiq indicated that Shafiq had given instructions to withdraw the matter. It is clear that the application should have been an application for an enlargement of time.

High Court Judgment dated 23 May 2019

[12] Shafiq then filed an application for an enlargement of time to file a notice of appeal against the Master’s Ruling dated 28 May 2015 pursuant to Order 59 Rule 10 of the High Court Rules. The summons was dated 29 April 2019 and came on for hearing before Amaratunga J in the High Court at Suva on 21 May 2019. In a judgment delivered on 23

May 2019 the High Court refused the application and awarded costs to the Valentines in the amount of \$1,250.00. Having outlined the chronology of the litigation and relying upon Order 59 and in particular Order 59 Rule 17(3) the Court concluded that the application was an abuse of the process of the Court.

Court of Appeal Proceedings

[13] Being dissatisfied with the orders made by Amaratunga J, Shafiq filed a timely notice of appeal on 13 June 2019. The Court of Appeal judgment delivered on 26 May 2023 considered in detail the history of the proceedings in the High Court and concluded that the Judge was correct when he dismissed Shafiq’s application as an abuse of process. The Court of Appeal did not consider the grounds of appeal raised by Shafiq on the basis that they were not relevant.

Supreme Court Proceedings

[14] The Petitioner filed a timely petition for leave to appeal together with the following grounds of appeal set out in the Petition:

- “i. The Fiji Court of Appeal erred in law when it failed to properly provide a reason why it failed to determine all the grounds of appeal duly filed by the Petitioner in the Court of Appeal and thereby denied the Principal of Natural Justice to the Petitioner.*
- ii. That the learned High Court Judge erred in law when he struck out the Petitioner’s application for time to be enlarged for the filing and serving of a notice of appeal from the decision of the then Master Vishwa Sharma dated 28th May 2015 under order 59 rule 10 of the High Court Rules 1988.*
- iii. That the learned High Court Judge erred in law when he failed to hold that on 23rd August 2016, the Honourable Mr Justice K. Kumar (as he then was) granted leave to the Petitioner to appeal against the decision of the Master of the High Court was deemed abandoned due to the negligence of the Petitioner’s former counsel and as such Petitioner should not be punished for it.*

- iv. *That the learned High Court Judge erred in law and facts when he failed to hold that the Learned Master had failed to consider the facts that on 30th June 2014, the Respondent's Solicitors, Messrs. Sherani & Co Lawyers wrote to the Petitioner's Solicitors which clearly express that the Respondent was only willing to settle if the Engineer's certificate was available since the engineers certificate were not ready by then.*
- v. *That the learned High Court Judge erred in law and facts when he failed to hold that the Learned Master also failed to consider that one of the conditions was that the Respondents were supposed to deposit the funds in Nand's trust account that was never complied with within stipulated time.*
- vi. *That the learned High Court Judge erred in law and facts when he failed to hold when he failed to consider that the Learned Master also erred in law when he failed to consider that there were disputed facts, and a summary judgment could not be entered. Further, the Learned Master considered Order 14 of the High Court Rules when the Application was made on Order 86 of the High Court Rules 1988.*
- vii. *That the learned High Court Judge erred in law and facts when he failed to consider that the Learned Master failed to consider whether there was evidence that the agreement was legally terminated and whey the settlement was not concluded by 1st August 2014 after the extension was granted.*
- viii. *The learned High Court Judge erred in law and facts when he failed to uphold that the learned Master failed to consider that there was fraud committed when there was no consent obtained or valid consent from Methodist Church."*

[15] Pursuant to section 98(4) of the Constitution an appeal from a final judgment of the Court of Appeal cannot be brought unless the Supreme Court grants leave to appeal. Section 7(3) of the Supreme Court Act 1998 provides that the Supreme Court must not grant leave to appeal unless the case raises (a) a far reaching question of law; (b) a matter of great general or public importance; (c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[16] The question as to whether leave should be granted under section 7(3) presupposes that the judgment of the Court of Appeal is erroneous. In other words, where a judgment is correct or does not give rise to sufficient doubt leave to appeal should not ordinarily be

granted. Otherwise the Court's role would be diverted to that of a second appeal court. In my opinion the purpose of requiring leave is to determine whether a substantive hearing of the Petition is warranted.

[17] As a starting point it was open to the Court of Appeal to affirm the conclusion of the High Court Judge (Amaratunga J) that Shafiq's application for an enlargement of time to appeal to the Court of Appeal was an abuse of the process of the Court. The application by summons filed on 29 April 2019, seeking an order for an enlargement of time to appeal the Master's decision dated 28 May 2015 is out of time by about four years. Whether the judgment is regarded as final or interlocutory is of little consequence under those circumstances. The delay is inordinate. Superimposed on the delay are the numerous interlocutory applications filed by Shafiq that were either out of time or were brought under the wrong Rule. The proceedings represent a clear abuse of the process of the Court. It is reasonable to conclude that the numerous applications were either as a consequence of instructions given to his legal practitioner by Shafiq or as a consequence of ignorance of the Rules on the part of the legal practitioners acting for Shafiq or as combination of both. Kumar J had concluded as much in his judgment dated 3 November 2017. Subsequent applications to the High Court by Shafiq reflected a similar approach to the Court Rules.

[18] The one issue that may have attracted a grant of leave was the issue concerning the distinction between interlocutory and final judgments. However for the present purposes, the judgment of this Court in **Jivaratnam and Singh –v- Prasad** [2023] FJSC 11; CBV 5 of 2020; 28 April 2023 provides sufficient guidance and assistance for the Courts below.

[19] For the above reasons I would refuse leave to appeal.

Young, J


[20] I agree with the orders proposed by Calanchini J and with his reasons.

Mataitoga, J

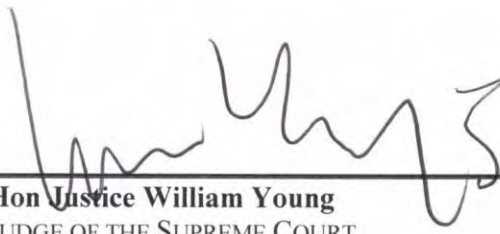
[21] I concur with the Judgment of Calanchini J.

Orders:

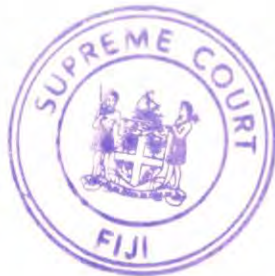
1. Leave to appeal is refused.
2. Petitioner is to pay to the Respondent \$10,000.00 costs within 30 days of the date of this Judgment.

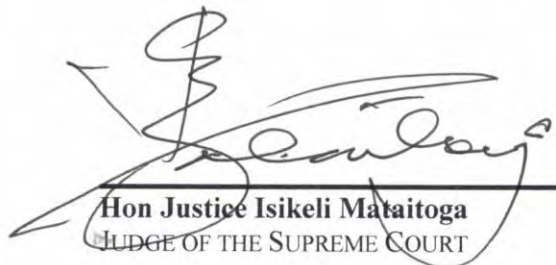


Hon Justice William Calanchini
JUDGE OF THE SUPREME COURT



Hon Justice William Young
JUDGE OF THE SUPREME COURT





Hon Justice Isikeli Mataitoga
JUDGE OF THE SUPREME COURT