

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0009/94S  
(Lautoka Magistrate's Court Action  
No. 52 of 1990)  
(Lautoka High Court Civil Appeal  
No. 5 of 1993)

BETWEEN:

MAYA WATI daughter of Suruj Din of  
Vaivai, Lautoka as the Administratrix  
of the Estate of Hari Prasad (father's  
name Jagmohan), Widow

Appellant/Defendant

and

UMESH PRASAD father's name Jagmohan  
of Vaivai, Lautoka, Farmer

Respondent/Plaintiff

Mr H. Lateef for the Appellant  
Mr A.K. Narayan for the Respondent

Date and Place of Hearing: 11 August 1995, Suva  
Delivery of Decision: 18 August 1995

DECISION OF THE COURT

1. Summons to show cause why appeal should not be dismissed.
2. Application to vary the amount ordered to be paid as security for costs.

There are two matters before us - first a summons in which the Appellant is to show cause why the appeal should not be dismissed for failure to comply with Rule 17(2) of the

Rules of the Fiji Court of Appeal, and second, an application by the Appellant to vary the quantum of security for costs ordered to be deposited into Court.

Whilst we heard both matters together we shall for obvious reasons deal with the first matter first.

A brief statement of the chronological background of the matters before us is called for.

On 30 September 1992 the Magistrate's Court at Lautoka in a written reserved decision entered judgment in favour of the Respondent in the sum claimed namely \$4000.00 with costs which was later taxed at \$475.00. The judgment was given on the evidence of the Respondent and his witness. The Appellant did not give evidence and did not call any witness. The Appellant appealed to the High Court on the ground that the transaction which gave rise to the alleged debt constituted a 'dealing' within the meaning of Section 12 of the Native Land Trust Act Cap. 134 and was null and void in the absence of consent by the Native Land Trust Board. Her appeal was dismissed by Ashton-Lewis J. on 13 December 1993. In a detailed and lucid judgment he held that the transaction did not constitute a "dealing". He also ordered costs against the Appellant. The Appellant filed a Notice of Appeal in the Fiji Court of Appeal on 11 February 1994. On the same day she issued summons for fixing security for payment of costs, returnable on 24 February 1994. On the hearing date neither the Appellant nor

her Counsel appeared. The Deputy Registrar fixed security for costs at \$1000.00 and ordered \$50.00 be deposited for preparation of the Record. Both sums were to be paid into Court within 28 days. The Appellant failed to comply with this order and continues to do so.

On 27 April 1994 the Appellant filed an application addressed to a single Judge of this Court to stay execution of the judgment pending appeal. On 29 April 1994 Mr Justice Thompson directed that the stay application was not to be listed for hearing until security has been given for the costs.

On 25 May 1995 solicitors for the Respondent wrote to the Registry that the appeal should be listed for striking out for failure to comply with the Court order.

On 5 July 1995 this Court issued summons to show cause why the appeal should not be formally dismissed for failure to comply with Rule 17 of the Court of Appeal Rules.

In response, the Appellant on 10 July 1995 filed an application to vary the order for security for costs. This was supported by an affidavit of one Anil Prasad, a Law Clerk in the employ of the Appellant's solicitors. Apart from explaining why the Appellant's Counsel did not appear at the hearing for fixing of security for costs the main thrust of the affidavit is that the order to pay in \$1000.00 is

excessive and that costs in the Magistrate's Court which amounted to \$475.00 have since been paid.

A similar affidavit was filed by the Appellant herself on 28 July 1995. In this affidavit she contended that the deceased Hari Prasad had paid all the monies to the Respondent and there was no balance left for the Estate to pay.

On 1 August 1995 the Respondent, in reply, filed the affidavit of Mohammed Kazim Yasin. In this affidavit it is contended that further costs were incurred in the Magistrate's Court which were taxed at \$410.50 and that so far the Respondent has recovered only \$4,244.03 pursuant to a garnishee order; which leaves a balance of \$230.97 plus the costs awarded by the High Court, which costs are still to be taxed as the relevant file was in Suva.

On 4 August 1995 the Appellant filed a further affidavit by Anil Prasad purporting it to be in "Reply to Respondants/ Plaintiffs Affidavit". No leave was sought or obtained from the Court for filing this affidavit.

The basis for this Court's action in issuing "Summons to show cause" is to be found in Rule 17(2) of the Court of Appeal Rules :

" +17.- .....

(2) In the event of non-compliance with paragraph (1) or in the event of any security required to be given not being given, or being

*only partly given, within the time directed, or within such extended time as a judge of the Supreme Court may allow, all proceedings in the appeal shall be stayed, unless the Court of Appeal shall otherwise order, and the appeal shall be listed for the next, or any subsequent, sitting of the Court of Appeal for a formal order of dismissal."*

(+Substituted by Legal Notice 41 of 1985.)

At the hearing of the matters before us the Appellant was represented by Mr H. Lateef who appeared on instruction from Messrs Vuataki, Prasad & Associates. Mr Lateef could not explain why the Appellant waited for nearly 1 year 5 months if she found the security for costs ordered to be paid into Court to be excessive. He said his instruction was to "offer" \$500.00 only and no more. Asked whether he had any submissions to make as to the prospects of the appeal succeeding bearing in mind the Respondent's contention that the appeal is destined to fail, Mr Lateef said he had none. We can understand Mr Lateef's predicament.

In our view the Appellant's failure to comply with the Court order borders on contempt. Whilst she moved swiftly to seek a stay of execution of the judgment, she took no steps to have the Deputy Registrar's order reviewed. If in fact she found the order excessive she had at least 2 options open to her. She could have immediately applied to the Registrar for a variation explaining, inter alia, by way of affidavit the circumstances which prevented her or her solicitor from appearing at the hearing for fixing security for costs and the reasons why the quantum was excessive. Alternatively she could have applied, under Rule 10 of the Court of Appeal

Rules, to a single Judge of this Court to vary the amount ordered. Furthermore she could have applied to a High Court Judge to extend the time for payment if time was the relevant factor. She took none of these options until circumstances forced her to apply for a variation which she did on 10 July 1995.

In Hadkinson v Hadkinson [1952] 2 All ER 567, Romer L.J. (at p.569) stated as follows :

*"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."*

With respect we adopt and apply the above observations to the present case.

Even if the Appellant was unable to comply with the order because it was beyond the means of the Estate she should have promptly applied for a variation. But here it seems she took it on herself to determine that the sum ordered was excessive and, therefore, did not pay the amount into Court.

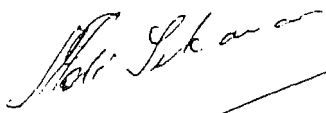
This Court might have been inclined to grant some indulgence with respect to the application for variation had the Appellant acted with expedition or had satisfactorily explained the delay, provided her appeal had some prospects of success. But such indulgence will be wholly misplaced having

regard to the Appellant's inordinate and unexplained delay and also the nature of appeal. We agree with the learned Counsel for the Respondent that the appeal is destined for failure. Without going into the merits it is patently clear that the appeal is an wholly unmeritorious one. One has only to peruse the several grounds of appeal to agree with the Respondent that the appeal is on matters not raised in High Court and seeks to introduce matters not even in evidence in the Magistrate's Court as the Appellant elected not to call evidence'. We might add that the grounds of appeal are also in breach of S.12(1)(c) of the Court of Appeal Act whereby a second appeal is limited to - "...any ground of appeal which involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction ....".

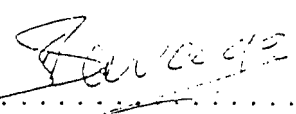
Decision and Orders

We have no hesitation in holding that the Appellant has failed to show cause why the appeal should not be dismissed. The appeal is hereby formally dismissed. In the circumstances we need not deal with the application to vary the security for costs.

The Appellant is to pay the costs of the proceedings in this Court.



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 Sir Moti Tikaram  
President, Fiji Court of Appeal



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 Mr Justice Richard Savage  
Judge of Appeal