

IN THE COURT OF APPEAL FIJI ISLANDS AT SUVA

**CIVIL APPEAL No. ABU 0093/08
(HBC # 179/92L)**

BETWEEN : **JAI PRATAP** (s/o Bal Karan of Votualevu, Nadi, Farmer)

APPELLANT

AND : **MAXWELL DAVID STORCK** and **DOROTHY GWENDA STORCK** (both of Yasawa Island Lodge, Yasawa, Joint Managers)

RESPONDENTS

Arguments : Tuesday 17th February, 2009, Suva

Counsel : Dr Sahu Khan for the Respondent /Appellant
Ms Naidu on instruction for the Applicant /Respondent

Date of Ruling: Friday 20th February, 2009 @ 11am, Suva

RULING

1.0 Facts

1.1 The High Court judgment was delivered on 8th December, 2008, at Lautoka and the Notice of Appeal was filed on 24th December, 2008 with fees paid. The affidavit of Service that was filed on 19th January, 2009 revealed that the Notice was served on 6th January, 2009.

The Summons for Security for Costs was also filed on 19th January, 2009.

1.2 The hearing of the Summons for Security for Costs was set down for 29th January, 2009 at 11am when the Counsel for the Respondent opposed the application and advised the Court that the matter should have been deemed abandoned as it was 'out of time.'

1.3 The matter was then adjourned to 17th February, 2009 for arguments.

2.0 Applicant/Respondent's Case

- 2.1 Ms Naidu, appearing on instruction for Vasantika Patel, counsel for the Applicant/ Respondent, argued that the Summons for Security for Costs which was filed and stamped at Registry on 19th January, 2009, was dated 21st January, 2009. How can it be filed and stamped with an earlier date from the date it was prepared by Counsel?
- 2.2 She also noticed that the service of the Notice of Appeal was made on 6th January, 2009, and according to **Rules 17(1)(a) of the COA Rules**, Summons for Security for Costs should be filed *within 7 days* after service of Notice of Appeal. This 7 days period has been breached and that the Summons is *out of time* and should be deemed abandoned.
- 2.3 She went on to state that the legal vacation period should not be reckoned in the computation of the times appointed or allowed. She cited *Ward JP* ruling on the **Transport Workers Union v. Arbitration Tribunal & Air Pacific Limited case – Civil Appeal ABU 111 of 2006** (unreported), delivered on 28th June 2007.
- 2.4 Counsel contended that even if Saturdays and Sundays are to be excluded and not computed for the 7 days period, as in **Order 3, Rule 2 (5) of HCR** the matter is still out of time.
- 2.5 On the issue of costs, Counsel argued that she was ready on the first day to argue the matter but the Respondent/Appellant had asked for an adjournment. Therefore, they should bear their own costs

3.0 Respondent/Appellant's Case

- 3.1 Dr Sahu Khan, counsel for the Respondent/Appellant responded that the issue about dates is basic and elementary, deserving no mention. All that matter is the date stamped by the Registry (19 January, 2009) and he referred this to **Order 63 Rule 1 of the HCR**.
- 3.2 **Rule 64 of the COA Rules** was cited which provides that non-compliance with the rules should not prevent further prosecution of an appeal nor should it nullify the same. The Court has powers to give necessary orders and directions that the appeal may proceed further.
- 3.3 The Respondent/Appellant argued that according to **Rajesh Prasad v. Nahari Electrical Company & Bank of Baroda – Civil Appeal ABU 0002 of 2006** (unreported), ruling by *Ward JP*, delivered on 7th February, 2006, the Court confirmed that time should not run during legal vacation period.
- 3.4 Pursuant to **Rule 6 of the COA Rules** and **Rule 64 of Supreme Court Rules**, the High Court Rules may be applied with modifications where necessary and according to **Order 3, Rule 2(5) HCR**, Saturdays and Sundays should be excluded in computation of time, 7 days or less.

3.5 Since legal vacation had expired on Friday 9th January, 2009, the 7 days period to file Summons for Security for Costs should run from Monday 12th January to 20th January, 2009, and his Summons was filed on 19th January, 2009.

3.6 Counsel contended that his application is within time and the objection by the Applicant/Respondent is just a waste of time and expenses and must be dismissed with costs.

4.0 **Law**

4.1 The laws are cited hereabove, grateful to both Counsel, but the matter raised has been a recurring one, perhaps in all our superior Courts, especially during legal vacation period.

4.2 The 2008-2009 legal vacation notice reads, at paragraph 4 that *“the time of the vacation shall not be reckoned in the computation of the times appointed or allowed by the High Court Rules for amending, delivery or filing any pleadings”*

4.4 In the **Transport Workers Union** case (supra), *Ward JP* had said that the terms spelled in the gazette notice *cannot be seen as applying to any procedures in this Court (COA) under the Court of Appeal Act or Rules”* because the notice was issued under the High Court Act

4.5 And his Lordship went on to say that *“if any such dispensation is to apply to the Court of Appeal, it will need a separate order from the President of the Court.”*

4.6 In his Lordship’s ruling for the **Transport Workers Union** case, it is clear that the legal vacation period is not to be reckoned when computing time and is excluded. It therefore supercedes his own earlier decision in **Rajesh Prasad v Nahari Electric**’s case(supra).

4.7 Therefore, the time to file Summons for Security for Costs should have been filed 7 days from the 6th of January, 2009, when the notice was served.

4.8 **Rule 17(1)(a) of COA Rules** reads *“The Appellant must within 7days after service of the notice of the appeal ………”* (emphasis mine), which means that the 7 days run from 7th January, 2009 and excluding Saturday 10th January and Sundays 11th January, 2009 as per **Order 3 Rule 2(5) of HCR.**

4.9 As such the 7 days expires on 15th January, 2009.

5.0 **Ruling**

5.1 The Summons for Security for Costs was filed on 19th January, 2009 and is 3 days out of time.

- 5.2 This is not as serious as one would consider as 2 of those 3 days fall on Saturday and Sunday.
- 5.3 This area needs consistency and our Court system has to have a single interpretation about computation of time during legal vacation period.
- 5.4 Accordingly, as outlined hereabove, the time of the legal vacation shall not be reckoned in the computation of time.
- 5.5 However, according to **Rule 64 of the COA Rules**, the Court must assist in getting the appeal prosecuted further despite the non-compliance of Rules.

6.0 Order

- 6.1 Application is allowed
- 6.2 Appeal is deemed abandoned due to non-compliance of the COA Rules.
- 6.3 In view of the circumstance, leave is given for the Appellant to file a fresh notice of appeal within the stipulated time under the Rules, without filing fee.
- 6.4 The fee paid for the filing of this notice of appeal be transferred to the fresh notice.
- 6.5 No order as to costs

Dated this 19th day of February, 2009



A handwritten signature in black ink, appearing to be "E. C. Koroi".

E. C. Koroi
REGISTRAR