

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

CIVIL APPEAL NO. ABU 0051 of 2015
(High Court Civil Action No. HBC 002 of 2015)

BETWEEN : **SURUJ MAL**

Appellant

AND : **SHEIK ABDUL RASHEED SAHIB**

Respondent

Coram : **Chandra, JA**
Lecamwasam, JA
Kumar, JA

Counsel : **Mr. A. Sen for the Appellant**

: **Mr. A. Ram with Mr. K. Ratule for the Respondent**

Date of Hearing : **3 February 2017**

Date of Judgment : **23 February 2017**

JUDGMENT

Chandra, JA

[1] I agree with the judgment of Justice Lecamwasam.

Lecamsawam, JA

[2] This is an Appeal filed by the Plaintiff/Appellant against the Interlocutory Judgment of the learned High Court Judge at Labasa dated 16th April, 2015. Facts of the case are clearly stated from (a) to (d) of paragraph 4 of the Judgment and from (a) to (h) of paragraph 5 of the Judgment, which makes repetition of the same redundant. The grounds of Appeal are as follows:

- “1. **The** Learned Judge erred in law and in fact in dismissing the application for an interim injunction restraining the respondents by themselves or their servants or agents or howsoever from interfering with appellants rights and entitlement on the said CT No. 20823 and his occupation of and coming within 200 meters from the precincts of his dwelling until the determination of Labasa High Court Civil Action No. HBC 02 of 2015.

2. **The** Learned Judge erred in Law and in fact in holding that the appellant had no basis for injunction when there was sufficient material before the Court by way of pleadings and affidavit that the appellant had an interest in Certificate of Title No. 20823 through principles of equity which entitled him of such reliefs.

3. **The** Learned Judge erred in Law and in fact in failing to take into consideration the principles of proprietary estopped and relief through adverse possession and only consideration submissions made by the respondent.

4. **The** Learned Judge erred in Law and in fact in falling to take into consideration *Chapter 39 of the Constitution of Republic of Fiji* when refusing to grant injunctions sought by the appellant. ”

- [3] The Respondent in his Written Submission raised a preliminary issue and I will deal with the same at the outset which will decide the fate of this case.
- [4] The learned High Court Judge had pronounced the interlocutory judgment on the 16th April, 2015.
- [5] In this case Notice of appeal has been filed on the 20th July, 2015. It is approximately 3 months and 4 days after the pronouncement of the Judgment. Whereas as per rule 16 of the Court of Appeal Rules he should have filed the appeal before 07th May, 2015, thereby he has not complied with the mandatory provisions of the Act.
- [6] Here in this case I don't see even an application for leave to file an appeal out of time.
- [7] As observed in **Bachu Lal v Viraj Lal Bhindi** (1990) ABU 1/90, "*No appeal is pending as the applicant is yet to properly seek and obtain leave of this Court to file Notice of Appeal out of time. Until the applicant does this, and is granted leave he is deemed to have lost his right of appeal. The purported notice of appeal filed out of time without leave cannot at this stage be treated in law as a Notice of Appeal,*" thus dismissed.
- [8] The facts of the instant case bear a striking similarity to the above case and hence on grounds expounded in Bachu Lal (*supra*) the matter at hand also has to be dismissed. This court is appraised of the judgment of **NLTB v Ahmed Khan and Another**; CBV 002.2013) where His Lordship Justice Gates, the Honourable Chief Justice, laid down certain guidelines to ensure that a principled approach to the exercise of judicial discretion in applications of enlargement of time within which to lodge a petition for special leave as follows-

- i. *The reason for the failure to file within time.*
- ii. *The length of the delay.*

- iii. *Whether there is a ground of merit justifying the appellate court's consideration.*
- iv. *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- v. *If time is enlarged, will the Respondent be unfairly prejudiced?*

[9] However, the instant case stands distinguished from the NLTB case, as there is no application for enlargement of time at all, whereas the guideline laid down in the NLTB case are in relation to the application for the enlargement of time and not in relation to appeals where the Appellant has not made any application for leave to appeal out of time. Therefore the two cases are clearly distinguishable.

[10] In the instant case we noticed scant respect by the appellant for the procedures not only because he had not filed the appeal within the stipulated time but also he had not troubled himself to apply subsequently for leave of court for enlargement of time. Hence the silence of parties cannot take away the right of Court to deal with a matter of this nature of flagrant violation of the rules of Court. Not only the appellant failed to come before Court within the appealable period but also he did not have the basic courtesy to apply for leave out of time. Therefore in reality, there's no appeal before court, for me to consider.

[11] This finding of court is adequately endorsed by his Lordship Chief Justice Gates in **NLTB v Ahmed Khan and Another** where he opined that "*As the time limits for appeal arise from a statutory framework providing for appeal within certain limits. They are not modifiable by consent of the parties the petitioner must bring him or herself within the rules in order to initiate a valid appeal*". Further the court is fortified by the endorsement of Hickie J A in **Rupeni Silimuana Momoivalu v Telecom Fiji Limited** ABU 37/06 which reads thus the "*the court expects time limits to be observed*"

[12] Eichelbaum, JA in Air Pacific Limited v Lice Elenivula Saumi [2002], ABU 1E/02. Observed that “*Extension is entirely within the Court’s discretion which has to be exercised according to the facts of the case.*” In the instant case there is no application for extension before court for the Court to use its discretion in the instant case.

[13] In conclusion as the appellant has not filed and served the notice and grounds of appeal within the stipulated time and hence the appeal has to be dismissed. Therefore I dismiss the appeal and order the parties to bear their own costs in this Court and the Court below. In view of the above, unlike in an application for leave to file an appeal out of time I do not see any need to lend our minds to go into the merits or substantive issues in this case.

Kumar, JA

[14] I agree with the reasoning and conclusion of Lecamwasam JA.

Orders of the Court are:

- i) Appeal dismissed.
- ii) Parties to bear their own costs.



Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

Hon. Mr. Justice K. Kumar
JUSTICE OF APPEAL