

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 89 OF 2016**  
**(High Court HBC 475 of 2007)**

**BETWEEN** : SALOTE KAIMACUATA

*Appellant*

**AND** : ASHWEN GIBSON BLAKE

*Respondent*

**Coram** : Chandra RJA

**Counsel** : Mr. A. Pal for the Appellant  
Mr. G. O'Driscoll for the Respondent

**Date of Hearing** : 16 March 2017

**Date of Ruling** : 16 June 2017

**RULING**

[1] This is an application for leave to appeal out of time pursuant to Section 20(1)(a) and (b) of the Court of Appeal Act, 2012, and Rule 16(b) and Rule 26(1) & (2) of the Court of Appeal Rules, against the judgment of the High Court dated 24<sup>th</sup> February 2016.

- [2] The Respondent by notice of motion dated 4<sup>th</sup> February 2008 filed in the High Court at Lautoka sought the following reliefs:
- (a) A declaration that the distress for rent issued by the defendant against the plaintiff is void due to irregularity.
  - (b) An order directing the defendant to return to the plaintiff all items set out in the Schedules A and B with Police assistance if necessary.
  - (c) Costs of the application.
- [3] The Appellant is the registered owner of the property situated at No.3, Rifle Range, Balawa Estate, Lautoka. The Appellant had given the keys of the said premises to the Respondent to occupy same. The Respondent had intended to purchase the property, but no sale and purchase agreement had been entered into by the parties.
- [4] On 12<sup>th</sup> June 2006 the Respondent had come to an understanding with the Appellant to purchase the property, however there was no understanding between them for payment of any rent.
- [5] The Appellant had contended that the Respondent was in arrears of rent and had levied distress for rent under the Distress for Rent Act.
- [6] The Respondent had then filed a motion to have the distress for rent declared void and to recover her goods set out in her application.
- [7] The High Court at Lautoka had on 19 September 2007 made order to return the Respondent's goods by 4 p.m. on that day and the case was transferred to Suva Civil Registry.

- [8] When the trial was taken up in the High Court at Suva, the Respondent had stated in her evidence that only part of her goods had been returned, and that there was no tenancy agreement in respect of the premises in suit. The Appellant failed to adduce any evidence regarding the existence of a tenancy agreement with the Respondent, nor any evidence regarding the payment of rent by the Respondent.
- [9] The learned High Court Judge by judgment dated 24<sup>th</sup> February 2016 made the following orders:
1. The distress for rent levied by the defendant against the plaintiff is declared void.
  2. The defendant is directed to return all items set out in the Schedules A and B to the summons, to the plaintiff.
  3. The defendant shall pay \$2000 as costs (summarily assessed) to the plaintiff.
- [10] The Appellant in her affidavit stated that she had instructed her lawyers to file an appeal and states that an appeal had been filed on 10<sup>th</sup> May 2016. This appeal had been assigned the No.ABU 0046 of 2016. But no further steps had been taken regarding same.
- [11] The Appellant's Solicitors had thereafter filed a summons on 9<sup>th</sup> August 2016 seeking leave to appeal out of time and stay pending appeal with an affidavit of the Appellant which is curiously dated 24<sup>th</sup> September 2016. This is the present application which is numbered as ABU 0089/2016.
- [12] The Respondent filed an answering affidavit on 4<sup>th</sup> November 2016 stating that there was no adequate explanation given for the considerable lapse of time in filing the application for leave to appeal and that the Appellant would need leave to appeal out of time and moved that the application be dismissed with costs.
- [13] In her affidavit in reply to that of the Respondent, the Appellant has stated that the delay was due to the Solicitors of the Respondent not accepting the notice and grounds of appeal and the difficulty in locating the Respondent for personal service. That the reason for the application was that the time stipulated under the Court of Appeal Rules had

lapsed and that her Solicitors had no other option but to file summons for leave to appeal out of time.

[14] It is clear from the contents of the affidavits of the Appellant that the application is for leave to appeal out of time as the time for appealing had lapsed.

[15] Granting of leave to appeal out of time is a discretion conferred on the single Judge of the Court of Appeal. In order to consider granting leave to appeal out of time, the Appellant has to satisfy the following criteria. The criteria were set down by the Supreme Court in NLTB v Ahmed Khan and Another (unreported CAV 2 of 2013; 15 March 2013 per Gates CJ) which are as follows:

- (a) the length of the delay;
- (b) the reason for the delay;
- (c) whether there is a ground of merit justifying the appellate court's consideration, or where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and
- (d) if time is enlarged, will the respondent be unfairly prejudiced.

*(a) Length of Delay*

[16] The judgment of the High Court was delivered on 24 February 2016 and the present application seeking leave to appeal out of time was filed after 165 days on 9 August 2016 an. The time permitted under the Rules is 42 days and therefore the length of delay is 122 days after the appeal was due, which is quite a considerable period of time.

*(b) Reasons for the delay*

[17] The reason adduced by the Appellant is that the Respondent could not be located and that the Solicitors for the Respondent had refused to accept the notice of appeal. The Appellant had annexed a notice of appeal and grounds of appeal dated 9<sup>th</sup> August 2016 to her affidavit, in an attempt to show that the appeal was a timely application.

[18] Even if that notice of appeal is taken into consideration it is dated 10<sup>th</sup> May 2016 which is also after the lapse of the permitted 42 days by 33 days. Therefore in any event the appeal has been out of time. However, no steps had been taken by the Appellant to pursue same if the Solicitors for the Respondent had refused to accept it. The submission that the said notice of appeal was one made in time is not correct.

[19] But what is now under consideration is the application for leave to appeal out of time filed on the 9<sup>th</sup> of August 2016 which as shown above has been filed after a considerable delay. The reasons adduced for the delay are not satisfactory.

*(c) Merits in Appeal*

[20] As to whether there is any merit in the grounds adduced in the application seeking leave to appeal out of time is the next consideration. What was before the learned High Court Judge was based on the motion filed on 4<sup>th</sup> February 2008 where the Respondent had sought a declaration regarding the distress for rent and the return of her goods.

[21] The learned trial Judge has considered the provisions of the Distress for Rent Act and on being satisfied on the evidence that there had been no tenancy agreement between the parties held that the distress for rent levied by the Appellant was void.

[22] I do not see any merit in challenging that decision as the said decision had been made by the learned High Court Judge on the evidence before Court.

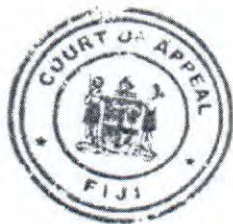
[23] The Appellant also takes up the position that the delay in getting the order was due to the inaction of the Respondent. An examination of the counter affidavit of the Respondent shows otherwise, the delay being due to applications being made by the Appellant. Therefore there is no merit in this submission as well.

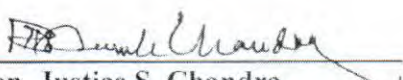
*(d) Prejudice to the Respondent*

- [24] The Appellant has submitted that no prejudice would be caused to the Respondent if time is enlarged.
- [25] On the other hand the Respondent has submitted that she would be unfairly prejudiced if there is further delay as more than 9 years have lapsed since she has been deprived of her items.
- [26] In those circumstances I am of the view that the Respondent would be unfairly prejudiced if time is granted.
- [27] In the above circumstances the application for leave to appeal out of time is refused and the application for stay pending appeal is also refused.

*Orders of Court*

- (1) Application for leave to appeal out of time is refused;*
- (2) Application for stay pending appeal is refused.*
- (3) The parties shall bear their own costs.*



  
Hon. Justice S. Chandra  
RESIDENT JUSTICE OF APPEAL