

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

**Civil Appeal No. ABU 0080 of 2016**  
**(High Court Civil Appeal No. HBE 30 of 2013)**

**BETWEEN** : **EXTREME BUSINESS SOLUTION (FIJI) LIMITED**  
*Appellant*

**AND** : **FORMSCAFF (FIJI) LIMITED**  
*Respondent*

**Coram** : Calanchini P  
Lecamwasam JA  
Guneratne JA

**Counsel** : Mr. P. Sharma for the Appellant  
Mr. N. Lajendra for the Respondent

**Date of Hearing** : 10 May 2018

**Date of Judgment** : 01 June 2018

**JUDGMENT**

**Calanchini P**

[1] I agree that the appeal should be dismissed with costs of \$4000.00 to be paid by the Appellant to the Respondent.

Lecamwasam JA

[2] This is a timely appeal filed by the Appellant against a ‘Ruling’ delivered by the High Court at Suva on 9<sup>th</sup> June 2016. The facts of the case in brief are that; Subsequent to a hearing before the Master, the Appellant had sought leave of the High Court to file an appeal out of time. The learned High Court Judge made the following orders on the said application on 9<sup>th</sup> March 2016:

1. *The application made by the Appellant for the enlargement of time to file and serve the Notice of Appeal is allowed.*
2. *The Appellant is hereby granted 7 (seven) days from today to file and serve the Notice of Appeal.*

[3] Consequent to the above order of the learned High Court Judge, the Appellant filed the Notice of Appeal on 16<sup>th</sup> March 2016 which was within the stipulated time. However, the Notice of Appeal though filed, was not served on the Respondent until 21<sup>st</sup> March 2016. In view of this situation, the Respondent had raised the following preliminary objections.

- (i) That the notice of appeal is not served within the time required; and
- (ii) That the notice of appeal filed by the Appellant was irregular in form as it makes provision for a returnable date and that the Appellant has not complied with the requirements of Order 59 R.17 of the High Court Rules 1998.

[4] In view of the above objections, having heard the parties, the learned High Court Judge later made the following orders as per paragraph [31] of his ruling dated 9<sup>th</sup> June 2016:

1. *This application is dismissed.*
2. *The Appellant shall pay the Respondent costs summarily assessed at \$1,500.00 within 30 days from today.*

[5] The instant appeal is against the above orders of the learned High Court Judge filed on the following grounds:

1. *The Learned Judge misdirected himself in law when he held at paragraph [18] that it was 'implicit' that the Respondent's objections on 22 March 2016 included the objection that the Appellant had failed to file its summons returnable before a Judge for directions within 21 days and the objection that the Appellant has failed to file its affidavit of service within 7 days of serving the Appellant's Notice of Appeal. Since :*
  - a. *The Respondent's additional objections were not specifically raised in Court by the Respondent on 22 March 2016;*
  - b. *The time allowed to the Appellant under Order 59 R.17(1) and (2) had not expired ; and*
  - c. *Holding the same contradicted paragraph 10 of the ruling and the Courts order /Direction on 22 March 2016 "that the time for filing any further documents prescribed in terms of the High Court Rules, will stop running until such time as this preliminary issue is determined.*
2. *The learned Judge erred in law when he failed and / or neglected to exercise discretion under Order 3 Rule 4(1) and (2) of the High Court rules 1988 to extend the time ordered by the Court to serve the Appellants Notice of Appeal on the Respondent.*
3. *The learned Judge erred in law when he failed or neglected to consider that service of the appellant's Notice of Appeal and the form in which the same was filed inter-related since the Appellant cannot serve what it does not have in its possession. Thus, upholding the Respondent's first preliminary objection despite his reasoning in paragraph [25] of the Ruling has resulted in nullifying the proceedings which is contrary to the provisions of Order 2 Rule 1 and 2 of the*

*High Court Rules, 1998 and principles outlined in Vishal Kumar v Avikash Pillay; Civil Appeal No.HBA 04 of 2013.*

4. *The Learned Judge erred in law when he failed or neglected to take into consideration when the Appellants Notice of Appeal was called before the honourable court on 22 March 2016. Counsel for both parties were in a position to obtain directions for the hearing of the Appellant's appeal which was on foot and there was therefore no prejudice caused to the Respondent.*
5. *The Learned Judge erred in law when he failed or neglected to consider that the Appellants had good and meritorious grounds of appeal before proceeding to dismiss the appellant's Notice of Appeal filed on 16<sup>th</sup> March 2016 based on the Respondent's first preliminary objection.*
6. *The learned Judge erred in law when he summarily assessed the Respondent's cost at \$1,500.00 as the same is harsh and excessive in all circumstances of the case.*

[6] The learned High Court Judge made the following observations at paragraph [6] of his ruling dated 9<sup>th</sup> June 2016, wherein he states thus:

*"[6]. After a full hearing of this matter, Court was of the view that this was an appropriate case for the granting of leave to appeal out of time and for permitting the enlargement of time to file and serve the notice of Appeal".*

[7] As the grounds raised in appeal are purely procedural in nature and fortified by the learned High Court Judge's observation that *"this was an appropriate case for granting of leave out of time and for permitting the enlargement of time to file and serve the Notice*



*of Appeal*” it becomes unnecessary for this court to deal with the merits of the case. It is obvious that the learned Judge was more than satisfied that there was an arguable case based on his own observation that the appellant may have had a serious matter to be tried meriting the initial granting of leave out of time.

[8] The Appellant filed summons in the High Court on 17<sup>th</sup> November 2015 seeking enlargement of time for filing and serving the appellant’s application for leave to appeal the judgment of the Master. On 16<sup>th</sup> December 2015, the Appellant filed an amended summons in the High Court seeking enlargement of time to file and serve notice of appeal.

[9] However, I find that the subsequent notice of appeal filed by the Appellant in the High Court was irregular in form which has resulted in this confusion. The learned Judge, albeit at paragraph 21 of his ruling dated 9<sup>th</sup> June 2016, chose to disregard the irregular form and requirements under Rule 17(2) in the following words:-

*“Therefore, the objection taken by the Respondent that the Notice of Appeal filed by the Appellant was irregular in form as it makes provision for a returnable date can be disregarded by court. In similar terms, the objection taken that the Appellant has not complied with the requirements of Order 59 Rule 17 (2) of the High Court Rules 1988 by failing to file its summons returnable before a Judge for directions within 21 days of the filing of the notice of appeal, can also be disregarded.”*

[11] Having heard the application, the learned High Court Judge delivered his ruling on 9<sup>th</sup> March 2016. While allowing the application for enlargement of time to file and serve the notice of appeal, the learned High Court Judge had given 7 days for filing and service of the notice of appeal.

[12] Although the period for filing and serving the Notice of Appeal was due to lapse on 16<sup>th</sup> March 2016, the appellant succeeded in filing only the notice of appeal and failed to serve the notice of service on the Respondent within the stipulated 7 days. Such Notice of appeal was served only on the 21<sup>st</sup> of March, according to the learned judge i.e. after a

delay of 5 days. As per paragraph 12 of his ruling, the learned High Court Judge had held that *“this is 5 days outside the time period provided”*.

- [13] He had made the above computation as per Order 3 Rule 2(5) of High Court Rules 1988 excluding Saturday 12<sup>th</sup> March and Sunday 13<sup>th</sup> March 2016 from the computation of time. Relying on the same clause, I observe that the Appellant had delayed the notice not by five days but by three days.
- [14] Having failed to file it on the due date of 16<sup>th</sup> March, he had filed the notice on the 21<sup>st</sup> which being the earliest possible date after 18<sup>th</sup> March since 19<sup>th</sup> Saturday and 20<sup>th</sup> Sunday ought to be excluded as per the above provision.
- [15] Although the Court made the ruling dated 9<sup>th</sup> June 2016 in an incidental matter, this cannot be considered an interlocutory order as the above ruling stalled any further steps being taken and in short put ‘an end’ to the proceedings. Therefore I treat this as a final order in which the question of leave does not arise. This is consistent with the decision of the Supreme Court in **Railumu & Others v Commander Republic of Fiji Military Forces & 2 Others**: [2004] FLR 418 (CBV 0008 of 2003S).
- [16] However, when the order is a final order, the appellant is required to satisfy the provisions of Section 3(4) of the Court of Appeal Act. The relevant section states as follows:-
- “(4) Subject to subsection [7(2) of the Administration of Justice Decree 2009], appeals lie to the Court on the question of law only from final judgments of the High Court given in the exercise of the Appellate jurisdiction of the High Court”.*
- [17] Therefore, in view of the above provision, an Appellant can only come to the Court of Appeal on a question of law only.
- [18] On a perusal of the grounds of appeal filed by the Appellant, I find the ground No. 3 involves interpretation of the above provisions contained in that ground. Hence I am

satisfied that he has fulfilled the threshold requirements embodied in Section 3(4) of the Court of Appeal Act.

- [19] Having said that, I now advert to Order 59 Rule 17(1) of the High Court Rules which states thus:-

*“17.(1) – The Appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service.”*

- [20] The above provision is a mandatory provision of statute which a court is bound to take notice of. In other words, the court cannot use its’ discretion when the statutory provisions are mandated.

- [21] Therefore the learned High Court Judge has not erred in coming to the conclusions in this case. The courts are not free to omit or add to the language contained in the statute; nor should a court lightly presume a mistake or omission on the part of the draftsman.

- [22] Considering the grounds of appeal cumulatively, I hold that the learned Judge has not erred in making the order dated 9<sup>th</sup> June, 2016.

- [23] For the reasons stated above, I would reject the grounds of appeal and the appeal is dismissed. The appellant shall pay the respondent \$4,000.00.

**Guneratne JA**

- [24] I agree with the reasoning, conclusion and proposed orders of Lecamwasam JA.

**The Orders of the Court are:**

1. *Appeal dismissed.*
2. *Appellant to pay costs to the Respondent in the sum of \$4,000.00.*



*W. Calanchini*  
.....  
Hon. Justice W. Calanchini  
PRESIDENT, COURT OF APPEAL



*S. Lecamwasam*  
.....  
Hon. Justice S. Lecamwasam  
JUSTICE OF APPEAL

*Almeida Guneratne*  
.....  
Hon. Justice Almeida Guneratne  
JUSTICE OF APPEAL