

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

CIVIL APPEAL NO. ABU 007 OF 2013
[High Court Civil Action No. HBC 147 of 2013]

BETWEEN : **CHANDRESH A PRASAD**

Appellant

AND : **VIRENDRA SINGH**

1st Respondent

SHAIENDRA PRASAD

2nd Respondent

Coram : **Basnayake, JA**
Lecamwasam, JA
Dayaratne, JA

Counsel : **Mr N R Padarath Appellant**
Ms M Vanua for the 1st and 2nd Respondents

Date of Hearing: **18 November 2019**

Date of Judgment: **29 November 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of Lecamwasam JA.

Lecamwasam, JA

[2] This appeal is preferred by the Appellant against an order of the High Court of Lautoka dated 10th April 2017. The facts in brief are:-

The Master of the High Court made an order in terms of specific discovery on 25th June 2015 which was consented to by the Appellant. The Appellant however did not produce the required documents in compliance of the said order. This prompted the Master to make another order on 24th September 2015 requiring the statement of defense of the appellant to be struck out under Order 24 Rule 16 (1) (b) of the High Court Rules 1988 unless he complied with the order within 14 days of its issuance i.e. on or before 08/10/2015. The appellant failed to comply with this order as well. On 9th October 2015 the Master struck out his defence pursuant to Order 24 Rule 16 (1) (b) of the High Court Rules 1988 as the appellant failed to comply with the order of 24th September. Though the appellants sought leave of the High Court to appeal against the Master's decision, it was refused by the Learned High Court Judge by his order dated 10th April 2017. The instant appeal is against the above order of the learned High Court Judge on the following grounds of appeal:

1. *The learned Judge of the High Court erred in law and in the interpretation of Order 59 Rule 11 of the High Court Rules by holding that there was a mandatory requirement that an application for leave to appeal and interlocutory order have to be filed and served within 14 days of the delivery of the order or judgment and failure to comply with the time limit was fatal and cannot be cured when:*
 - 1.1 *the mandatory requirement under Order 59 Rule 11 was that the application had to be made by way of summons with the supporting affidavit*
 - 1.2 *the time within which the application had to be filed and served was not mandatory;*
 - 1.3 *the learned Judge had powers to abridge or extend the time within which such an application could be filed and served;*

2. *The Learned Judge of the High Court erred in law in holding that the proposed grounds of appeal had to be prepared to show that the appeal had a prospect of success when there is no such requirement in law.*

3. *The Learned Judge of the High Court erred in law in holding that the Master's order striking out the statement of defence under Order 24 Rule 16(1)(b) of the High Court Rules did not appear to be incorrect when:*
 - 3.1 *The power to strike out the defence could only be exercised if judgment could be entered on the claim and in this case, due to the nature of the plaintiff's claim, no such judgment could be entered.*
 - 3.2 *The learned Judge had given leave to the first defendant to appear at the trial and cross examine witnesses and therefore the correct legal approach was to apply Order 24 Rule 16(1)(a) and stop the first defendant from producing the documents at trial.*
 - 3.3 *The learned Judge failed to consider whether it was just in the circumstances to strike out the defence and failed to consider that:*
 - 3.3.1 *There was no formal application seeking "unless" or guillotine orders which were made on the 24th September 2015;*
 - 3.3.2 *The Appellant was not given reasonable time or opportunity to be heard on whether such "unless" or guillotine orders could be made on the 24th Septembers 2015;*
 - 3.3.3 *There was no formal application seeking to strike out the statement of defence filed on behalf of the Appellant;*
 - 3.3.4 *The Appellant was not given reasonable time or opportunity to prepare and be heard on whether his statement of defence ought to be struck out.*

[3] The Appellant in his written submissions stated that he will not pursue the 2nd ground of appeal which makes a response to the said ground redundant.

[4] In order to respond to the first ground of appeal in this case it is necessary to consider the chronological sequence of the events which led to this appeal. The Master, on the application of the respondents for specific discovery, made an order on 25th June 2015 requiring the appellant to serve the respondents with copies of certain documents including bank statements and correspondences.

[5] As the appellant had not complied with the order dated 25th June 2015 the Master made the following order on 24th September 2015,:-

“The first defendant is granted 14 days to comply with the order dated 18/9/15. The documents to be disclosed on or before 8/10/15. If not complied the statement of defence will be struck out under Order 24 Rule 1(B). Mention on 9/10/15”.

[6] When the matter was mentioned on 9th October 2015, as the appellant had not complied with the order of specific discovery, the Master made the following Order:

“The first defendant has not complied with the unless order. I do not see a justified reason to extend or vary the unless order.”

[7] Being aggrieved by the above order, the appellant filed summons seeking leave to appeal against the said order on 23rd October 2015. This application was refused by the learned High Court Judge by his Order dated 10th April 2017, against which the instant appeal is preferred.

[8] The High Court judgment that is being challenged in this Court is in respect of an appeal filed by the Appellant against the decision of the Master. That appeal was governed by Order 55 Rule 3 of the High Court Rules and was by way of rehearing. The appeal to this court is against the judgment of the High Court and has been made in terms of section 12(1)(c) of the Court of Appeal Act. This therefore is a second tier appeal. Section 12(1)(c) of the Court of Appeal provides that an appeal shall lie *“on any ground of appeal involves question of law only from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal.”*

[9] Do the grounds of appeal urged by the appellants contain questions of law? On perusal of the grounds of appeal it is evident that the first ground of appeal itself is a ground based on the question of law. Therefore I am satisfied that the threshold requirement has been satisfied and this court has jurisdiction to hear this appeal.

- [10] Upon a consideration of facts in this case, I find that the core of this appeal relates to the filing and serving of summons on the opposing party urged in the 1st ground of appeal, which will also have a bearing on the response of this court to the 3rd ground of appeal.
- [11] The respondents, both in their written submissions and at the time of argument, moved Court to dismiss the appeal on the basis that the court cannot use its discretion as the provisions relating to the filing and serving of summons are mandatory.
- [12] Therefore, it is important in this case to determine whether the failure on the part of the appellant to file and serve the required summons within the stipulated time is fatal to the maintainability of the appeal or not. The appellant was mandatorily required to file and serve summons seeking leave to appeal within 14 days of the Order. The 14 day period for the order given on 9th October 2015 lapsed on 23rd October 2015, by which time the appellant ought to have filed and served the relevant summons. However, as per the stamp of court it is clear that even though the appellant had filed the summons on 23rd October as required, the summons had been served on the respondents only on 11th November 2015. The position of the appellant is that the delay in serving summons on the respondents is due to the failure on the part of the court to release the summons back to him to be served on the respondents within the required time.
- [13] It is therefore apparent that if the court had released the summons on the same day, the appellant would have had the opportunity to serve it on the respondents within the course of the day, the failure of which led to the delay in serving summons. On perusal of the record, it is clear and evident as suggested by the appellant in his submissions as well as in court that although the summons were filed on 23rd October 2015 it had been released to the appellant by the court registry only on 10th November 2015. Upon such release, the appellant had wasted no time in serving it on the respondents on 11th November 2015.
- [14] However, while the appellant was prevented from serving summons on the respondents on time due to a delay on the part of the court registry, the lackadaisical and indolent manner in which the appellant had approached the filing of summons is also responsible

for the delay. The appellant should have exercised diligence and lent his mind to the practicalities of having the summons released to him on the same day when there is a mandatory time limit to be observed. The learned High Court Judge was correct in concluding that the provisions relating to serving of summons cannot be overcome by treating them as discretionary provisions.

- [15] On the other hand, I cannot be unmindful of the delay on the part of the court registry in retaining the document in court from 23rd October until 10th November 2015, which, despite the less than prompt actions of the appellant, put him in a helpless situation. Therefore, it is incumbent on this court to prevent any miscarriage of justice due to lapses on the part of the court. The provisions of Order 2 Rule 1 of the High Court Rules, the appellant in his written submissions had adverted the attention of the court to, are appropriate in addressing this lapse. The said provision reads thus:-

“where, in beginning or purporting to begin any proceedings or at any stage in the course or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment, or order therein”.

- [16] On the strength of the above provision, although the serving of summons within 14 days is mandatory, the 1st ground of appeal is allowed, in order to avoid a miscarriage of justice due to a lapse of the court registry which would otherwise prevent the court from going into the merits of the issue.
- [17] However, in view of the languid attitude of the appellant towards the judicial process which caused extra expense to the defendant, I order the appellant, (though he is successful in appeal) to pay FJ\$2000.00 to the Respondents (FJ\$1000 to each respondent) as costs.

[18] In conclusion, I answer the 1st ground of appeal in favour of the appellant, however, subject to costs as stated above.

[19] I also hold that the merits of the 3rd ground of appeal are to be determined in an appeal of the learned Master's decision.

Dayaratne JA

[20] I have read in draft, the judgment of Lecamwasam JA and agree with the reasons and conclusions contained therein.

Orders of the Court:

Appeal is allowed.

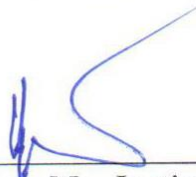
- 1. The Appellant to pay FJ\$2000.00 to the Respondents (FJ\$1000 to each Respondent) as costs.*



Hon. Mr. Justice E Basnayake
JUSTICE OF APPEAL



Hon. Mr. Justice S Lecamwasam
JUSTICE OF APPEAL



Hon. Mr. Justice V Dayaratne
JUSTICE OF APPEAL