

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

**CIVIL APPEAL NO. ABU 002 of 2018**  
HBC 197 of 2014S

**BETWEEN** : **SABIR HUSSAIN trading as SABIR BUILDERS**  
**and KHALIL HUSSAIN**

*Appellants*

**AND** : **GAYA PRASAD**  
**and PRAVEEN PRASAD**

*Respondents*

**Coram** : Almeida Guneratne, JA

**Counsel** : Mr A K Singh for the Appellants  
Mr S Singh for the Respondents

**Date of Hearing** : 20 August, 2020

**Date of Ruling** : 18 September, 2020

## RULING

- [1] This is an application for leave to enlarge time for filing Notice of Appeal against the judgment of the High Court dated 27 January, 2017.
- [2] By that Judgment the learned High Court Judge found in favour of the Respondents for breach of a contract and made orders accordingly.
- [3] Relying on the criteria laid down in the leading case of NLTB v. Ahmed Khan & Anr CBV 2 of 2013, (15 March, 2017) in applications seeking leave for enlargement of time to appeal, the Appellants have sought to explain the length of delay and the reasons for the delay.
- [4] In seeking to do so, the Appellants have sought to take refuge in ‘lapses’ on the part of their original Solicitors.

### Lapses on the part of lawyers as opposed to “mistakes” in construing legal provisions

- [5] In that regard I gave my mind to the Supreme Court thinking in Fiji Industries Ltd v. National Union of Factory and Commercial Workers; CBV 008 of 2016, 27 October, 2017.
- [6] In that case the Supreme Court expressed the view that, “mistakes” on the part of lawyers should not visit upon litigants. (Jone Batinika v. iTaukei Land Trust Board; ABU 007 of 2020, 14 August, 2020).
- [7] In a recent ruling of mine I extended that Supreme Court thinking to a situation where there had been a “breakdown of communications” between the lawyers and party litigants.
- [8] As against that, in another recent ruling I held the view that, “lapses” on the part of lawyers as opposed to “mistakes” cannot be allowed to stand on the same footing. (see: Moti Chand & Ors v. iTaukei Lands Trust Board; ABU 72/2017, 11 September, 2020).

- [9] I re-iterate that proposition in the instant case. The Appellants lament in transferring the delay to the lawyers cannot be condoned. A party to litigation also has a duty to be vigilant and follow up his or her case.

#### **The Prejudice Criterion**

- [10] That brought me to address the issue of prejudice. Without having to say more, the Respondents have been denied the enjoyment of the victory they achieved from January, 2017.

#### **Merits urged**

- [11] I have carefully gone through the judgment of the High Court. I could not see any flaw in the said judgment which I adopt totally together with the reasons given therein.
- [12] For the aforesaid reasons I have reached the conclusion that, the Appellants have failed to satisfy the criteria laid down in **NLTB v. Ahmed Khan** (*supra*).
- [13] However, in fairness to the Appellants I felt it was obligatory on my part to address what appeared to as an added (new) ground of appeal, which the Appellants submitted, if I understood their submissions correctly, as being a matter that went to the root of the matter.

#### **What was that matter?**

- [14] It was submitted for the Appellants that, the 1<sup>st</sup> Appellant being resident overseas, he was never served with the writ of summons and that no affidavit of service had been filed in the High Court. Consequently, it was submitted that there was a breach of Order 6 Rule 6 (1) of the High Court Rules (1988) and that this is sufficient to set aside the whole judgment.

[15] I cannot subscribe to that argument for the following reasons:

- (a) That reason had not been put to the learned High Court Judge for his consideration.
- (b) Even if it had been put to him then the proceedings initiated before His Lordship could not have been rendered *void ab initio* by reason of the provisions contained in Order 2 Rule 1(1) of the High Court Rules, although the said proceedings could have been said to have been voidable, had that point been taken before the High Court in which event the Respondent could have been in a position to take steps to regularize the proceedings.
- (c) The reason given by the Appellants that Mr. Hussein “fully depended” on his previous solicitors to keep him updated (and to advise)” is not acceptable in which regard I hark back to what I have articulated at paragraphs [8] and [9] above in this Ruling.
- (d) Apart from all those considerations I looked at the statement of Defence filed by the Appellants (Defendants) dated 21 August, 2014, in which I could find not one word based on the provisions of Order 6 Rule 6(1) of the High Court Rules.
- (e) Furthermore, the Solicitors for the Defendants (Appellants) have acknowledged service of the writ of summons initiated by the Respondent in the main cause against them. (*vide*: Motion dated 22 July, 2014).

[16] For the aforesaid reasons I agree with the submissions made on behalf of the Respondents that, the said summons of the Respondents allegedly not being served on the 1<sup>st</sup> Respondent (being a matter raised for the first time in appeal before this Court) is, in any event, not entitled to be entertained.

#### **Determination and Conclusion**

[17] For all the reasons stated, I am not inclined to grant the Appellants’ application and proceed to make my Orders as follows:

Orders of Court

1. *The Appellants (Applicants) application for leave for extension of time to appeal the judgment of the High Court dated 27 January, 2017 is refused and accordingly dismissed.*
2. *Consequently, the Appellants application for a stay of execution of the said High Court Judgment is also refused and dismissed.*
3. *The Appellants are ordered to pay as costs of this application a sum of \$1,500.00 to the Respondents within 21 days of notice of this Ruling.*



*Almeida Guneratne*

.....  
**Almeida Guneratne**  
**JUSTICE OF APPEAL**