

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

**CIVIL APPEAL NO. ABU 53 of 2018**  
**(Lautoka High Court Civil Action No: HBC 60 of 2006)**

**BETWEEN** : **MAHENDRA SHARMA** Businessman, Lautoka  
**1<sup>st</sup> Appellant**

**AND** : **MAHENDRA SHARMA** as the Administrator in the **ESTATE OF**  
**RAJENDRA SHARMA** late of 153 Triangle Road, Massey,  
Auckland, New Zealand, Builder Intestate  
**2<sup>nd</sup> Appellant**

**AND** : **NATIVE LAND TRUST BOARD**  
**Respondent**

**Coram** : Almeida Guneratne, AP

**Counsel** : Mr S Lutumailagi for the Appellants  
Ms L Komaitai for the Respondent

**Date of Hearing** : 21 October, 2021

**Date of Ruling** : 19 November 2021

## **RULING**

[1] The Appellants have made this application by summons to restore to the list of appeals the appeal which was deemed to have been abandoned. The summons is supported by the Appellants affidavit dated 25<sup>th</sup> August, 2020.

[2] The Appellants' application has been opposed by the affidavit dated 1<sup>st</sup> December, 2020 filed on behalf of the Respondent.

### *Basis on which the Respondent has opposed the Appellants' application*

[3] The Respondent has opposed the application of the Appellant's on the basis that, the transcripts being a necessary component of the copy record, the Appellant was sitting on his rights and did not take necessary steps to seek further time to comply as provided in the relevant Court of Appeal Practice Directions before the Appeal was deemed abandoned. (paragraph 12 of the Respondent's supporting affidavit).

### *Relevant Court of Appeal Practice Directions No.1 of 2019 (PD)*

[4] The relevant clauses of the PD are clauses 3,4 and 5. The said clauses speak of the lodging of the Record for Certification. They refer to the delays in doing so, steps required to be taken in seeking enlargement of time after the time prescribed for the lodging of the Record of Certification.

[5] Consequently, the Respondent in its submissions has laid stress on the aforesaid clauses and has contended that “\_ \_ \_ Appellant ought to be seeking the leave of the Court to appeal out of time as opposed to the restoration to the cause list” (vide: paragraph 2 of the Respondent's written submissions).

Practice Direction No.5 of 2019

[6] The Respondent relies on clauses 4 and 5 of this PD.

*“4. A request for an enlargement of time that is made prior to the date upon which the record should have been lodged for certification made be made by letter to the Registry and shall be granted as requested.*

*5. A request for an enlargement of time that is made after the time prescribed shall be made by summons with supporting affidavits. This application will proceed before a judge of the Court in the usual manner.”*

[7] In sum the Respondent has submitted that the Appellants:

- (a) had failed to comply with both PD’s Nos. 1 and 5 of 2019;
- (b) have not provided any reasons to excuse the delay of over 2 years (date of filing Notice/Grounds of Appeal being in June 2018 and their first letter to the Registry inquiring in regards the trial transcript being in July 2020.

Summary of arguments (reasons) adduced by the Appellant in support of his application

[8] The Appellant has submitted that:

- (i) The Appeal was filed within time;
- (ii) Security for costs of appeal was also paid;
- (iii) The copy records could not be uplifted in time due to the fact that, the court transcripts were not made available

[9] Having given my best consideration to the submissions made on behalf of parties and the contents of the respective affidavits, I proceed to make my determination as follows.

Determination

[10] The Registry had issued a certificate of abandonment on 27<sup>th</sup> February, 2020. However, I do not see any notice having gone to the Appellant. In that regard, I re-iterate the view I expressed in **Maimun Nisha v. Mohammed Abu Baker Siqqique** [ABU 0012 of 2018, 8<sup>th</sup> December, 2020).

[11] In **Maria Vani Marieta Vunisa v. Emosi Nawaikalou Lutu and Others**, ABU 20 of 2020, I took the view that when an appeal is “deemed abandoned” judicial sanction need to be obtained by an order of the Court. I re-affirm that view.

[12] In the present case both those requirements, that is, “*notice*” and “*judicial sanction*” are not satisfied. Thus, I hold that, any contention that the initial appeal stood abandoned cannot be sustained.

[13] It follows then that the need to have sought leave of the Court of Appeal out of time does not arise.

[14] Although I do accept the Respondent’s position that, the Appellant’s and their Solicitors have been at some fault in regard to Practice Directions No.1 of 2019 and No.5 of 2019, it has been my experience that there is at most times a communication breakdown between parties and the Registry, the main reason being the High Court Records not being available. If the judges notes, transcripts are not made available, how could one expect for parties to comply with the time lines prescribed?

[15] This situation can be arrested only by Counsel informing this Court on the call over date for fixing dates for hearing that the complete copy records are not ready.

[16] The aforesaid factors taken together with the fact that the Appellant had filed the appeal within time and had paid security for costs of the appeal weighed with me in exercising discretion under section 20(1)(k) of the Court of Appeal Act in granting the Appellant's application.

[17] The Appellant has contended that the Respondent has failed to issue him with a Registered Lease when all dues have been paid. As against that, the Respondent has submitted the said lease was not issued as the survey provided by the Appellant include buildings in adjoining lots.

[18] To my mind it appears that there is a serious matter to be looked into in Appeal touching on the substantive rights of property of a party as well.

**Orders of Court**

- 1) The Appellant's application is allowed and appeal bearing No.053/2018 is re-instated/ restored to the cause list;
- 2) There shall be no costs;
- 3) Since this is a 2018 appeal the Registrar is directed to have this matter mentioned on the earliest call over date after the Appellant obtains the transcripts and informs the Registry.



A handwritten signature in blue ink, appearing to read "Almeida Guneratne", is written over a horizontal line.

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Almeida Guneratne  
**ACTING PRESIDENT, COURT OF APPEAL**