

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0020 of 2021
[High Court at Labasa Case No. HBA 08 of 2019]

BETWEEN : **MANASA RADOLO**
: **KELERA ADIMAITOGA**

Appellants

AND : **LALITA WATI**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellants absent and unrepresented**
: **Ms. S. Nand for the Respondent**

Date of Mention : **11 August 2022**

Date of Ruling : **15 August 2022**

RULING

[1] The appellants had filed summons for leave to appeal out of time on 12 March 2021 seeking *inter alia* enlargement of time to appeal against the High Court judgment dated 23 October 2020 which dismissed their appeal subject to cost assessed at \$3000 to the respondent.

[2] The High Court judge had set out the relevant facts as follows:

- 1. The respondent filed action in the Magistrate Court of Savusavu by writ of summons dated 1 June 2015 to evict the appellants from the disputed land. The respondent is the registered proprietor of that land which is described in certificate of title No: 14368, Navutu (part of) Lot 21 of DP No: 3037. The appellants by their statement*

of defence pleaded that they resided on the property for more than 20 years without the payment of rent and that the property was bequeathed to them by the previous owner, Chandra Prabha. The appellants counter-claimed for compensation in a sum of \$25,000 for losses to their property and belongings, and sought general and exemplary damages in a further sum of \$30,000.00, due to psychological effects resulting from eviction out of their premises through action said to be initiated by the respondent in 2015.

2. After trial, judgment of the hon. magistrate (“magistrate”) was delivered on 26 June 2019 (though dated 26 April 2019), allowing the respondent’s claim. The appellants were directed to give up possession of the subject property within 31 days and to pay the rental arrears of \$7,200 within two months. The appellants’ counterclaim was dismissed. On 23 August 2019, the resident magistrate stayed the execution of the judgment until the determination of the appeal.

[3] Even at the hearing before the High Court the appellants had been absent and unrepresented. A perusal of the HC judgment reveals that 05 grounds of appeal were on mixed facts and law and only the last ground of appeal was on a point of law. However, the High Court judge had dealt with all of them meticulously before dismissing the appeal.

[4] This is a second tier appeal to this Court. The right of appeal against a decision made by the High Court in its appellate jurisdiction is given in section 12(1) (c) of the Court of Appeal Act. In a second-tier appeal under section 12(1) (c) of the Court of Appeal Act, a decision of the High Court could be canvassed on a ground of appeal involving a question of law only and that right is further subject to section 12(2) [see **Kaur v Singh** [1999] FJCA 46; Abu0011u.98s (13 August 1999)]. The Court of Appeal does not have jurisdiction to undertake any exercise involving in the determination of mixed issues of fact and law in a second tier appeal under section 12(1) (c) of the Court of Appeal Act [vide **Fiji Sugar Corporation Ltd v Fiji Sugar and General Workers Union** [1997] FJCA 31; ABU0013u of 96s (18 August 1997)]

[5] However, if the appeal under section 12(1) (c) of the Court of Appeal Act is not timely, then the appellant should obtain extension of time within which a notice of appeal or an application for leave to appeal may be given, in terms of section 20(1)(b) of the Court of Appeal Act.

- [6] The effect of sections 12(1) (c) and 20(1)(b) of the Court of Appeal Act is that an appellant cannot appeal out of time against the judgment of the High Court unless extension of time to file a notice of appeal (or an application for leave to appeal) is obtained and one of the matters that must be determined when considering extension of time, in the case of any judgment given by the High Court in the exercise of its appellate jurisdiction, is whether there is any ground of appeal involving a question of law only [see **Lakshman v Estate Management Services Ltd** [2015] FJCA 26; ABU14.2012 (27 February 2015)]
- [7] Designation of a point of appeal as a question of law by the appellant or his pleader would not necessarily make it a question of law [see **Chaudhry v State** [2014] FJCA 106; AAU10.2014 (15 July 2014). It is therefore counsel's or an appellant's duty to properly identify a discrete question (or questions) of law in promoting a section 12(1) (c) appeal (see **Raikoso v State** [2005] FJCA 19; AAU0055.2004S (15 July 2005)).
- [8] In this case, all grounds of appeal sought to be urged in the Court of Appeal are admittedly questions of fact and law and not matters of law alone. In any event, the 'catch all' approach to drafting grounds of appeal to include 'error of law and fact' is unacceptable [vide **Courts (Fiji) Ltd v Sharma** [2009] FJCA 22; ABU0006.2006 (6 November 2009)]. The only question of law canvassed before the High Court had been dropped, for the High Court judge had dealt with fully. The respondent had filed an affidavit in opposition and the appellants had not tendered an affidavit in reply.

Question of law

- [9] The phrase 'a question of law alone' is one of pure law to the satisfaction of the court, as opposed to one of law unaccompanied by any other ground of appeal [vide **Naisua v State** [2013] FJSC 14; CAV0010.2013 (20 November 2013)]. On a perusal of the appellants' averments in their affidavit relating to merits of the appeal and the matters urged in opposition by the respondent in her affidavit, it is abundantly clear that the issues sought to be canvassed by the appellants either involve facts alone or mixed facts and law. There is no pure question of law identified by the appellants. The appellant cannot seek to re-

open and re-argue the facts of the case in a second tire appeal under section 12(1) (c) of the Court of Appeal Act [vide **Khan v Wati** [1992] FJCA 16; ABU 0014u of 91s (24 August 1992)].

Extension of time

- [10] Now, I shall consider the question of extension of time. The principles that have emerged from the cases in relation to extending time to appeal are as follows. The overarching consideration is the interests of justice. The factors relevant to that inquiry are the length of the delay and its reasons; the parties' conduct; the extent of the prejudice caused by the delay; the prospective merits of the appeal; and whether the appeal raises any issue of public importance [vide **Almond v Read** [2016] NZCA 147 (Harrison, Wild and Kós JJ) [Almond (CA)] and **Janferie Maeve Almond v Bruce James Read** [2017] NZSC 80 (30 May 2017)].
- [11] I have examined the matter at hand in so far as the appellants' application for enlargement of time under section 20(1)(b) is concerned in the light of principles established in Fiji and set out in **Sundar v Prasad** [1997] FJCA 39; Abu0022d.97s (10 November 1997) *vis-à-vis* the High Court judgment, the appellants' papers filed in this court and respondent's submissions. The delay is admittedly 05 months which in my view is substantial, misunderstanding that the appeal could be filed later when sufficient funds were collected is an unacceptable explanation and I find that their appeal is devoid of any merits. To my mind, the appeal does not involve any question of law alone.
- [12] As already indicated earlier jurisdiction of this court under section 12(1) (c) of the Court of Appeal Act cannot be used to re-open and retry matters of fact and mixed fact and law already ventilated in the Magistrates court and the High Court. There is no issue of public importance nor is it necessary to grant extension of time in the interests of justice. The extension of time, if granted will prejudice the respondent who has obtained judgments in her favour in the two courts below. Thus, there is no basis whatsoever to grant an extension of time to appeal out of time.

Want of prosecution of the appeal

- [13] Even if an appellant could satisfy this court that extension of time to appeal should be given and there is a pure question of law involved, still this court has the discretion to dismiss the appeal in terms of section 20(1)(g) of the Court of Appeal Act if it is not prosecuted with due diligence.
- [14] After filing the appeal, the appellants' solicitor had appeared in this court only once *i.e.* on 26 March 2021. On 19 April 2021 the appellants were absent and unrepresented and their counsel had sent a medical certificate. Respondent too had been absent and unrepresented. On the next date *i.e.* 02 November 2021 both parties had been absent and unrepresented and appellants' counsel had sent a letter indicating that he was sick without a medical certificate. On 23 November too both parties had been absent and unrepresented and this court had directed notices on the parties to appear in court for the third time in a row.
- [15] The court had been informed on 04 January 2022 that the 02nd appellant had passed away and the court had directed that steps be taken to effect substitution. The 01st appellant had been absent and there had been no representation either. Respondent had been represented. On 13 June 2022 counsel for the respondent submitted that the 01st appellant had vacated the land and the respondent had even sold the land to a third party. No substitution had been effected in place of the deceased 02nd appellant. 01st appellant too was absent and unrepresented. The respondent's counsel requested court to strike out the appeal. This court directed the CA registry to once again issue notice on Mr. Tuifagalele, solicitor/counsel for the appellants to be present in court on 11 August 2022.
- [16] The Registry had duly served notice on Mr. Tuifagalele who had confirmed the receipt of it. Nevertheless, neither Mr. Tuifagalele nor his client, the 01st appellant was present on 11 August 2022. The counsel for the respondent repeated the earlier application for striking out the appeal. Mr. Tuifagalele has been noticed of the date of the ruling too.


[17] It is obvious that the appellants and their solicitor/consul clearly have no intention of prosecuting the appeal. The Court of Appeal said in **Registrar of Titles v Prasad** [2001] FJCA 5; Abu0009D.2001s (8 June 2001) that the new Rules send a clear message to all prospective appellants - it is the appellant's duty to file appeals, and to take all steps to push the appeal to a hearing. Any further postponements and adjournments would only result in consuming valuable judicial time and burdening administrative process at the Registry.

[18] Given all the circumstances, I refuse extension of time to appeal under section 20(1)(b) and make order dismissing the appeal in terms of section 20(1)(g) of the Court of Appeal Act.

Orders

1. Extension of time to appeal is refused.
2. Appeal dismissed in terms of section 20(1)(g) of the Court of Appeal Act.
3. The 01st appellant is directed to pay \$3500.00 to the respondent as cost within 04 weeks of this ruling.




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Hon. Mr Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL