

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

CIVIL APPEAL NO. ABU 0043 OF 2019
(Lautoka High Court HBC: 122 of 2009)

BETWEEN : **SAHEED KUMAR**

Appellant

AND : **MANOJ KUMAR**

Respondent

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Mr N Vakacakau for the Appellant**
Mr S Lutumailagi for the Respondent

Date of Hearing : **24 January, 2023**

Date of Ruling : **17 February, 2023**

RULING

[1] This is an application to re-instate an appeal which was struck out and dismissed by order dated 8th November, 2021, upon Court finding that the Appellant was absent and unrepresented though being noticed to appear on that date.

Reasons adduced by the Appellant for non-appearance

- [2] In the Appellant’s affidavit dated 15th November, 2021 filed in support of the summons for re-instatement, the Appellant has urged that, the reason for the non-appearance by his solicitors on the date in question was due to an oversight on their part for taking the date down as 8th December instead of 8th November.
- [3] That averment is supported by the affidavit dated 12th August, 2022 of Mereisi Liku Tinaivugona said to be a legal executive attached to the Appellant’s solicitors firm.
- [4] As deposed to in that affidavit, the giving of the very date of 8th November was due to the unavailability of the judge apparently on the date the case was due to be taken in the ordinary course.

Basis of opposition to the summons seeking re-instatement

- [5] The main basis on which the Respondent opposes the Appellant’s summons is stated at paragraph 4 of his affidavit, that the Appellant’s lapse was not an oversight “*but rather negligence and/or carelessness on the Solicitors part.*”
- [6] Both Counsel cited several precedents in support of their respective stands in the background of the factual content averred in their affidavits referred to above.

The rival submissions made by Counsel at the hearing

- [7] Taking first the Appellant’s submissions, I shall summarise them as follows:-
- (a) That, this Court (me, sitting as a single judge) had struck out an appeal and/or dismissed it on a mention date;

- (b) That, the said date 8th November on which this Court had struck out the appeal was on the one single non-appearance date by the Appellant;
- (c) That, it was at a stage when even the copy records had not been vetted or certified.
- (d) That, in any event, the non-appearance on 8th November had been due to the fact that the lawyers had taken the date as 8th December instead of 8th November (communicated to them via email correspondence) by the Registry that being occasioned by the fact that on the antecedent date the Court was due to take the bench, the Court had not sat.

[8] As against those submissions made on behalf of the Appellant, the Respondent's submissions were focused on what has been averred in his affidavit which I have re-capped in paragraph [5] above (*"the negligence and/or carelessness on the solicitors part"*), which submission was based on reliance of several past rulings of mine.

[9] Having given my mind to the affidavits filed, the written submissions tendered and the oral submissions made I proceed to make my assessment of the rival submissions and the ensuing determination as follows.

Determination

[10] Responding first to the Appellant's contention re-capped by me in paragraph [7] and the Respondent's submission reproduced in content in paragraph [8] above, I felt that, a Ruling (Decision) on the issue that flows therefrom could await a future Ruling/Decision, in as much as, the instant matter demands to be decided on other considerations (two issues to be specific) which I shall now give my mind to.

The first issue

[11] Whether this Court (me, sitting as a single judge) on a mention date could or ought to have struck out an appeal?

[12] Having given my mind to the reasons adduced by the Appellant which I have re-capped in paragraph [7] (a), (b) and (c) thereof, in all humility I say that I could not and ought not to have done so.

“Actus Curiae Neminem Gravabit”

[13] What I have said in paragraph [12] above in the underlined portion therein is what is envisaged in the maxim which I have referred to above, that, “*an act of Court should not prejudice a party.*”

[14] Accordingly, I vacate the order made by me on 8th November, 2022.

The second issue I needed to address on

[15] That is, the issue raised by the Respondent that, to date, the Appellant has failed to pay the costs awarded by the High Court in its judgment which is sought to be appealed.

[16] In that regard, my experience in the last decade as a Judge of Appeal has been Orders of Court for payment of costs are ignored.

[17] That cannot be allowed to continue.

[18] Consequently, bearing in mind the avowed proposition that, the law is the means that resolve conflicting/contesting interests/rights, and indeed, the Courts being the institution

that is conferred with that duty taking in and having regard to the present conflict of interests of the parties *inter se*, I proceed to make my Orders striking a *via media*, between the said competing interests of parties.

Orders of Court:

- 1) *The Appellant's application for re-instatement of the Appeal is allowed.*
- 2) *However, it shall be subject to the Appellant paying within 21 days of notice of this Order the costs awarded by the High Court in its Judgment.*
- 3) *Upon failure to comply with Order 2 above, the Appellant's appeal shall stand rejected and/or dismissed for non-compliance with the aforesaid Order 2 in terms of Section 20(1)(g) of the Court of Appeal Act.*
- 4) *Having regard to all the circumstances of this case which I have addressed in this Ruling particularly at paragraphs [12] to [14] above, I make no order for costs.*



A handwritten signature in purple ink, which appears to read "Ida A. Guneratne".

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Falcom Chambers for the Appellant
Chetty Law for the Respondent