

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

**CIVIL APPEAL NO. ABU 0051 OF 2019**

(Civil Action No. HBC 196 of 2014)

**BETWEEN** : **MOHAMMED SHAFIQ**  
*Appellant / Defendant*

**AND** : **ANTHONY MARK VALENTINE**  
**SHAINAZ ZAREENA BIBI VALENTINE**  
*Respondents / Original Plaintiffs*

**Coram** : (Dr) Almeida Guneratne, P  
Basnayake, JA  
Lecamwasam, JA

**Counsel** : Mr. A. Singh and Ms. M. Shafiq for the Appellant  
Mr. S. Singh for the Respondents

**Date of Hearing** : 01 November, 2022

**Date of Judgment** : 26 May, 2023

**JUDGMENT**

**(Dr) Almeida Gunaratne, P**

[1] I agree with His Lordship, Justice Basnayake's judgment in its entirety.

**Basnayake, JA**

- [2] This is an appeal filed to set aside the judgment (pgs. 5-9, 92-96 and 98-102 of the Record of the High Court (RHC)) dated 23 May 2019. By this judgment the application for enlargement of time to file a second notice of appeal against the Master's decision dated 28 May 2015 was struck off in *limine*.
- [3] The subject matter of this case is a property. This property was leased to the Defendant/Appellant (hereinafter referred to as the Defendant) by the Methodist Church in Fiji (Memorandum of Lease is at pages 223-228 RHC). The Defendant on 23 March 2014 entered into a sale and purchase agreement (pgs. 34-39, 125-130 and 229-234) with the Plaintiff/Respondent (hereinafter referred to as the Plaintiff) to sell this property for \$180,000.00 as per the terms of the agreement. The Plaintiff on 15 July 2014 (pg. 182) filed writ of summons together with a statement of claim ((183-184) and an amendment of statement of claim (179-180) seeking inter alia for specific performance. The Defendant filed a statement of defence on 12 August 2014 (187-189). On 4 August 2014 the Plaintiff filed a motion together with an affidavit (216-221) for an order for summary judgment in terms of Order 86 Rule 1 of the High Court Rules (HCR) 1988. The learned Master of the High Court after a hearing (1 April 2015) (pgs. 4-5 of the Supplementary RHC) (SRHC) pronounced judgment on 28 May 2015 (pgs. 50-71, 141-162 and 194-215 RHC) in favour of the Plaintiff.
- [4] The Defendant appealed (Notice and grounds of appeal dated 11 June 2015 (pg. 7 of SRHC-Notice and grounds not filed of record). As per the minutes of 23 August 2015 (pg. 6 of SRHC) the Solicitor Ms. Preetika appearing for the Defendant seeks leave to withdraw the notice and grounds of appeal. Mr. Singh appearing for the Plaintiff does not object. Hence the learned Judge allowing the application to withdraw the appeal and the grounds filed on 11 June 2015 dismiss and struck out the appeal without costs on 23 August 2015.
- [5] Apparently there was a mortgage. On filing summons on 7 October 2015 together with an affidavit by the Plaintiff and upon hearing learned counsel for the Plaintiff and the

Defendant the learned Master on 9 December 2015 (pgs. 299-300) made inter alia the following orders, namely, that the Defendant liaise with Housing Authority and arrange for a discharge of Housing Authority Mortgage No. 581614 within seven days and on failure, at the cost of the Defendant the Plaintiff to arrange a discharge with the Housing Authority and to effect the transfer of the property with the Registrar of Titles. The court also ordered to deposit the net sale proceeds in court and ordered the Defendant to vacate possession. The learned counsel for the Plaintiff submitted that the monies relating to the property were paid into court, the Defendant had been paid and the Plaintiff has been placed in possession. All that was done on the strength of the Order dated 9 December 2015 (pgs. 299-300).

- [6] On 15 March 2016 the Defendant had filed an application for leave to appeal out of time. On 2 June 2016 this application was dismissed with liberty to file a fresh application. On 16 June 2016 the Defendant filed another leave to appeal out of time application. On 23 August 2016 the court granted leave to file appeal against the Master's judgment dated 28 May 2015. However this order was sealed only on 24 May 2017 which is nine months after the pronouncement of the order. On 3 August 2017 the Defendant had filed a notice and grounds of appeal. Why did the Defendant wait to file a notice until 3 August 2017? The minutes of court dated 18 July 2017 explains the reason. The minute is as follows-(pg. 16 of the SRHC)

*“Court: Where is Appeal-that was ordered to be filed on 23/08/2016 ... Court granted Leave for Defendant to file Appeal out of time on 23/08/2016. To-date no appeal has been filed. Since defendant has failed to file Appeal and there is no appeal on foot it is an abuse of process for Defendant to file Stay Application. It is quite clear that Defendant by his solicitors is trying to delay the inevitable and waste every ones time including Court's time. In view above this Court makes following orders: (i) Summons for Stay of Execution and Leave to Appeal is dismissed and struck out”.*

- [7] It is only after this minute that the Defendant filed the appeal on 3 August 2017. The learned Judge by his Ruling dated 3 November 2017 dismissed and struck out the notice and grounds of appeal filed on 3 August 2017 (pgs. 75-86). The learned Judge held by his Ruling that as per Order 59 Rule 9 (b) of the HCR the appeal should have been filed within

seven days from the date of granting of leave. Leave was granted on 23 August 2016. The appeal should have been filed by 30 August 2016. This appeal was filed on 3 August 2017.

Order 59 Rule 9 (b):

*9. An appeal from an order or judgment of the Master shall be filed and served within the following period:- (a).....(b) In the case of an interlocutory order or judgment within 7 days from the date of granting leave to appeal.*

- [8] The learned Judge held that the appellant (Defendant) should have filed and served notice of appeal on or before 30 August 2016. The appellant (Defendant) by failing to file and serve the appeal by 30 August 2016, has breached Order 59 Rule 9 (b) of HCR. The learned Judge held that after 30 August 2016 the appellant (defendant) should have sought extension of time to file notice of appeal out of time which he has failed to do. The notice of appeal filed on 3 August 2017 was held to be a clear abuse of court process.
- [9] The Defendant does not challenge this Ruling. Ignoring the Ruling made on 3 November 2017, the Defendant on 3 May 2019 filed another notice out of time application against the decision of the Master's judgment dated 28 May 2015 (Summons (pgs. 103-104) and an affidavit of the Defendant (pgs. 106-117)). Whilst the learned Judge in unambiguous terms warned the Defendant for abusing the legal process the Defendant filed the present application.
- [10] The learned Judge by his Judgment dated 23 May 2019 ordered to strike off the summons with costs at \$1250.00 to be paid by the Defendant to the Plaintiff. The learned Judge states as follows in paragraph 21 (pg. 9 RHC): 21.

*"So in my judgment the application for enlargement of time to file second Notice of Appeal against the Master's decision should be struck off in limine without considering the merits as there is no provision in the High Court Rules of 1988 when the appeal was struck off and dismissed. Defendant had taken steps in the case after dismissal for over 3 years having failed all of them he cannot be allowed to make a fresh appeal. This application is abuse of process and Plaintiff is awarded a cost of \$1,250, summarily assessed, to be paid by the Defendant".*

[11] It appears that the learned Judge has overlooked the Ruling of Justice Kumar (as he then was) dated 3 November 2017. In that Ruling the Defendant's Notice and Grounds of Appeal filed on 3 August 2017 was dismissed with costs and the learned Judge has clearly declared the Defendant to have abused the process of court. With all that the Defendant files this Summons on 29 April 2019 seeking leave to enlarge/extend time for filing of a notice of appeal.

[12] Grounds of Appeal

1. *That the learned Judge erred in law when he struck out the Plaintiff application for time be enlarged for the filing and serving of a notice of appeal from the decision of the Master Vishwa Sharma dated 28<sup>th</sup> May 2015 under order 59 rule 10 of the High Court Rules 1988 (para 18).*
2. *That the learned Judge erred in law when he failed to hold that 23<sup>rd</sup> August 2016, that Honourable Justice K. Kumar granted leave to the Appellant appeal against the decision of the Master was deemed abandoned due to the negligence of the Appellant's former counsel and as such Appellant should not be punished for it. (see whether there is an affidavit as said by Justice Keith)*
3. *That the learned Judge erred in law and facts when he failed to hold that the learned Master had failed to consider the facts that on 30<sup>th</sup> June 2014 the Respondent's Solicitors Messers. Sherani & Co Lawyers wrote to the Appellant's Solicitors which clearly expressed that the Respondent were only willing to settle if the Engineer's certificate was available since the engineers were, not ready by then.*
4. *That the learned Judge erred in law and facts when he failed to hold that the learned Master also failed to consider that one of the conditions was that the Respondents were supposed to deposit the funds in Nand's trust account that was never complied with within stipulated time.*
5. *That the learned Judge erred in law and facts when he failed to hold when he failed to consider that the learned Master also erred in law when he failed to consider that there were disputed facts and a summary judgment could not be entered. Further the learned Master considered Order 14 of the High Court Rules when the application was made on Order 86 of the High Court Rules 1988.*

6. *That the learned Judge erred in law and facts when he failed to consider that the Learned Master failed to consider whether there was evidence that the agreement was legally terminated and why the settlement was not concluded by 1<sup>st</sup> August 2014 after extension was granted.*
7. *That the learned Judge erred in law and facts when he failed to uphold that the learned Master failed to consider that there was a fraud committed when there was no consent obtained or valid consent from Methodist Church.*
8. *That the Respondent pay the cost of this appeal.*

[13] I am of the view that the grounds of appeal are not relevant to the facts of this case. The Defendant without any respect to the orders made by courts has kept on filing applications after applications. By a Ruling dated 3 November 2017 the learned High Court Judge Hon. Justice Kumar (as he then was and later Chief Justice) has dismissed and struck off the Defendant's appeal dated 3 August 2017 and declared that the act of the Defendant in filing this appeal was an abuse of court process. In spite of that the Defendant has again on 29 April 2019 filed the present set of papers.

[14] The compilation of the High Court Record itself has been done haphazardly. The documents required in deciding this case has been omitted whilst several documents filed several times to bloat the Record. The chronology of events was compiled with the assistance of the Ruling dated 3 November 2017 of Justice Kumar. The written submissions filed on 4 September 2020 of the Appellant (Defendant) states in paragraph 26 (pg. 8) that, "The full chronology of events is stated in the Judgment of his Lordship dated 3<sup>rd</sup> November 2017".

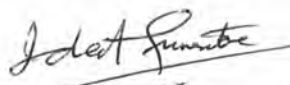
[15] I am of the view that this appeal should be dismissed with costs in a sum of \$5000.00 payable to the Plaintiff/Respondent by the Defendant/Appellant. I am of the view that the learned Judge was correct in regard to striking off the application for enlargement of time *in limine* by his judgment dated 23 May 2019.

**Lecamwasam, JA**

[16] I agree with the reasons and conclusion arrived at by Basnayake JA.

**Orders of Court are:**

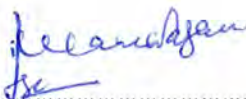
1. *Appeal dismissed.*
2. *Costs in a sum of \$5000.00 payable by the Appellant to the Respondent within 28 days from the date of this judgment.*



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**Hon. Justice (Dr) Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**



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**Hon. Justice Eric Basnayake**  
**JUSTICE OF APPEAL**



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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**