

**IN THE HIGH COURT OF FIJI AT LABASA**

**CIVIL JURISDICTION**

**CASE NUMBER:** HBA 4 of 2012

**BETWEEN:** **FRED WEHRENBURG**

APPELLANT

**AND:** **INOKE BULIVOU**

RESPONDENT

**Appearances:** Appellant in Person.

Mr. A. Naco for the respondent.

**Date/Place of Judgment:** Monday 20 May, 2013 at Labasa

**Judgment of:** The Hon. Madam Justice Anjala Wati.

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## **JUDGMENT**

**CATCHWORDS:**

*APPEAL - Practice and Procedure - Appealing against refusal to grant leave to appeal out of time. Where application for leave to appeal out of time stayed and no orders granted by Court as plaintiffs conduct amounted to having abandoned its application for leave to appeal out of time - appeal premature.*

**LEGISLATION:**

*The Magistrates' Courts Rules Cap 14.*

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1. The plaintiff is appealing against the decision of the lower Court of 8.2.2012 in refusing the plaintiff leave to appeal out of time. The decision of 18 December 2011.

2. The decision of 13 December 2011 was on the defendant's application to set aside the judgment entered against the defendant on 18 February 2011. The plaintiff's case was heard undefended.
3. The default judgment was only set aside on the basis that there was a good defence to the case in that the defendant was sued in person as a director of A.P. Consultants Ltd when the contract pursuant to which the defendant was sued was between the plaintiff and the company. The Court held that the company right to have been sued instead.
4. In setting aside the judgment the Court gave the defendant time to file his defence within 14 days, that is, on or before Monday 26 December 2011. The plaintiff was given time to file and serve reply with 14 days of receipt of the statement of defence was assigned a returnable date of 17 January 2011.
5. On 16 January 2012 the plaintiff filed an application for leave to appeal out of time the decision of 13 December 2011 which was granted the defendant leave to defend the action. The defendant did not appear so did he file any defence as ordered by the Court. The Court adjourned the matter on 8 February 2012 for ruling on motion seeking extension of time to appeal on 18 February 2012.
6. On 18 February 2012 the defendant again did not appear or file the defence. The plaintiff was ordered to serve the writ of summons at Naco Chambers, a firm of solicitors representing the defendant. The plaintiff then sought that he be given time to amend his summons. The Court gave the plaintiff 21 days to amend its summon. The Court then stayed the motion for leave to appeal out of time and adjourned the matter to 20 March 2012.
7. How and on what basis the Court ordered the writ of summons to be served on the defendants lawyers is not known. There was no application before the Court to that effect. I also cannot explain or fathom why the Court did not take any action when the defendant continued to delay the Court order of not filing the defence and he also failed to appear in Court.

8. On 8 February 2012 when the plaintiff asked to amend its writ of summons, by his action it is discernible that he wanted to continue with the substantive proceedings and not his application for leave to appeal out of time. What the nature of the amendment was, was not indicated by the plaintiff at the lower Court.
9. If the plaintiff wanted to proceed with his application for leave to appeal, there was no need to seek leave to amend the claim for if leave application was successful. The plaintiff would have got an opportunity to appeal the ruling on setting aside judgment. If the plaintiff was further successful in its appeal at appellate Court, the judgment entered in absence of the defendant would be intact and there would be no further need to seek leave to amend the claim.
10. By asking for leave to amend the claim, the plaintiff though not explicit, but impliedly abandoned its application for leave to appeal out of time. Further the plaintiff raised no objection to the Court staying the motion for leave to appeal.
11. The Court has not refused leave to appeal out of time but due to the plaintiffs application the motion was properly stayed.
12. The question of leave to appeal against the refusal thus does not arise at all. The appeal against refusal to appeal is thus misconceived at this stage.
13. I also notice that in the appeal, the plaintiff also appeals against the ruling of 13 December 2011 where the Court gave the setting aside judgment.
14. The appeal against the setting aside ruling is also misconceived. It is out of time and the leave has been granted to appeal against the said decision. This Court thus cannot even consider the appeal on the substantive grounds.
15. I wish to further outline what happened in Court on and after 20 March 2012 to demonstrate how this appeal is on a procedural error.
16. On 20 March 2012 the plaintiff appeared in Court, the defendant did not. The plaintiff advised the Court that he had served the notice of intention to appeal and amended out of

summons of Naco Chambers on 5 March 2012. The Court indicated that it had received a letter from Naco Chambers dated 20 March 2012 seeking 7 days to file statement of defence. The Court gave the defendant 7 days to file the statement of defence and adjourned the case to 3 April 2012. The Court also noted that it had sent the notice of appeal to Labasa High Court at the plaintiffs request.

17. The notice of intention to appeal and notice of appeal referred to in the proceeding paragraph was filed on 13 February 2012 and 28 February 2012 respectively. The earlier document is the intention to appeal against the refusal to grant leave on 8 February 2012 and the latter document is the main appeal. The decision of 8 February 2012 and 13 December 2011. I have already said in the proceedings paragraphs the notice of appeal against the decision of both 8 February and 17 December is procedurally improper and misconceived.
18. The Court did not cast its mind seriously towards the notice of intention to appeal or the notice of appeal. I do not know why the Court did not comment on it but the one reason could be that both documents were premature. There was no refusal to grant leave to appeal but the application was stayed. The appeal on the substantive grounds was simply out of time. Its fate depended on the motion for leave to appeal out of time.
19. The plaintiff ought to have heard its application for leave to appeal out of time or shall I say of that kind with an unrepresented plaintiff who apparently did not understand the procedure should have asked the plaintiff to obtain legal advice and inform the Court whether he was serious in prosecuting his leave to appeal application or in proceeding with the substantive appeal.
20. Then comes the next Court date of 3 April 2012. The defendant is again not present on this day as usual and the Court indicates that it had received the statement of defence. It then ordered that the statement of defence be served on the defendant. Since the defendant was absent the plaintiff asked for a bench warrant. The Court refused on the grounds that in civil cases, bench warrants against defendants are not permissible. The Court also ordered

that if the defence was not served on the plaintiff within 7 days the judgment granted in favour of the plaintiff was to be reinstated. The matter was adjourned to 10 April 2012.

21. On 10 April 2012 none of the parties was present in Court. The Court noted to have received a letter from the plaintiff wherein he indicated having received a statement of defence. The Court then ordered the plaintiff to file its reply to defence within 14 days and adjourned the case to 7 May 2012.
22. On 7 May 2012 the plaintiff was present, the defendant was not. The Court indicated that it had received a letter from Naco Chambers asking for an adjournment to 9 May 2012. The Court noted that the pleadings were complete and it adjourned the matter to 9 May 2012.
23. Before I state what happened on 9 May 2012, I wish to state that it appears that the Court had been dealing with letters from both parties without them having to appear in Court. I must say that no Court must conduct proceedings on letters but on formal applications and appearances in Court. We are in .....nation which deals with rules of procedure, I find no procedure in the Magistrates Courts Rules Cap 14 which allows the Court to exercise jurisdiction on letters.
24. On 9 May 2012 the plaintiff was present and so was Mr. Naco. Mr. Naco asked for 7 days to file further response to defendants reply and he also indicated that the plaintiff could be given time to file further response as well.
25. I cannot imagine how Mr. Naco could make such an application when the pleadings were closed. I can understand the plaintiff making an application of this kind. Be that as it may, the plaintiff informed the Court that he had objection to Mr. Naco's application but that the wanted :
  - (a) All the documents from the defendant before trial;
  - (b) A pre-trial conference;
  - (c) File affidavit evidence from his side; and
  - (d) Appeal against the setting aside order.

26. The Court then indicated to the plaintiff that in that case the proper time for appealing against the setting aside would now be after the substantive hearing. The plaintiff insisted that by notice of appeal be sent to High Court for a ruling. The Court ordered so and the sitting Magistrate recused itself from the proceedings saying that *"I am now recusing myself from hearing this matter to protect the orders of this Court and to disallow the plaintiff's feelings that I am biased towards the defendant. The matter was referred to another Magistrate from 12 June 2012"*.
27. The Court proceedings of 9 May 2012 the plaintiff could not have made two contrary applications. One for procedural orders to enable the trial to proceed and two to appeal against the orders for setting aside the judgment appeal. The appeal against the setting aside naturally has to proceed first ...it cannot because it was out of time and I reiterate for the sake clarity although at the risk of repetition that the application for leave to appeal out of time was never heard and refused. It was stayed. Therefore there cannot be any appeal against the refusal. There could be an appeal against the stay. There is not any.
28. The plaintiff I can say is procedurally confused. Mr. Naco has not been of any help to the Court. Having issued various orders to ensure that the substantive matter progresses trial the Court found itself in a compromised position and a different Court was asked to deal with the matter. Had the earlier Magistrate noted the plaintiffs application with precision and dealt with it vigilantly, I don't think that this problem would have arisen. The plaintiff also gave an indication to the Court that he was interested in disposal of the final proceedings and made application which were to dispose the writ claim. His changing of the time and not being able to decide what he wants has caused procedural havoc.
29. The appeal against the refusal to grant leave to appeal out of time is premature and so is the appeal on the decision to set aside the judgment.
30. Both applications must be dismissed. The substantive proceedings progressed so far and is ready for trial. It is only in the interest of justice that the case be heard on merits.
31. In the final orders:-

- (a) The appeal is dismissed.
- (b) The writ claim is to be assigned an early hearing date before Mr. Tomasi Bainivalu [RM].
- (c) I make no order as to costs.

**Anjala Wati**

**Judge**

**20.05.2013**

To:

1. *Mr. Fred Wehrenberg, for the plaintiff.*
2. *Mr. Naco, for the defendant.*
3. *File: HBA 4 of 2012.*