

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBA 06 of 2014

BETWEEN : **SAILESH KUMAR**

APPLICANT

AND : **NILESH NIRMAL SINGH**

RESPONDENT

R U L I N G

INTRODUCTION

[1]. Before me is a Summons for Leave to Appeal Out of Time filed by Sailesh Kumar ("**Kumar**"). The Summons is reproduced in part below:

....an application by the Appellant **FOR AN ORDER** that the Appellant be granted leave to file grounds of appeal out of time and leave to appeal the order of the Small Claims Tribunal made on 25th February 2014 and that all proceedings in the Nadi Magistrates Court be stayed in the meantime until delivery of the Judgment of the High Court **AND FURTHER TAKE NOTICE** that the grounds for the application herein for leave to appeal are that:

1. That the Learned Referee conducted in a manner which was unfair to the Appellant and prejudicially affected the result of the proceeding.
2. That the Tribunal exceeded its jurisdiction whilst determining the proceeding.
3. That the Tribunal took irrelevant factors whilst determining the proceeding.
4. That the Appellant/Plaintiff reserves the right to amend or file further grounds of appeal prior to the hearing of this application.

AFFIDAVIT IN SUPPORT

[2]. The Summons is supported by an affidavit sworn by Kumar on 20 June 2014.

In that Affidavit, Kumar deposes:

1. That I am the Defendant/Respondent in the action herein.
2. That save where otherwise expressly stated, I depose the truths of all facts in this Affidavit from my own knowledge.
3. That the Referee conducted this proceeding in a manner which was unfair and was biased.
4. That I was having financial difficulty as I was unable to engage a solicitor but I have filed an application to set aside the judgment and stay of execution on 20th February 2014 which was listed on 1st April 2014. (Annexed herein and marked "SK1" is a copy of my said application.
5. That I was not aware that I had to file grounds of appeal and the time to appeal was lapsed.
6. That I have been advised by my solicitors that I have to appeal the decision of the referee and therefore instructed my solicitors to file the same.
7. That my solicitors filed the same on or about 31st March 2014. (Annexed herein and marked "SK-2" is a copy of the said Application).
8. That I was advised by my solicitors that the Honourable Magistrate did not hear my application and simply struck out the same on 6th May 2014.
9. That upon my request my solicitors on 14th May 2014 wrote to the Senior Court Officer and requested for written ruling. (Annexed herein and marked "SK-3" is a copy of the letter.
10. That on 6th June 2014 I was advised by my solicitors that they have not received the written ruling from the Court.
11. That I further consulted my solicitors who advised me to file an application in the High Court for leave to appeal out of time.
12. That due to financial difficulties I uplifted my file from my solicitors and filed the present application in person.
13. That I have been advised by my solicitors on or about 10th June 2014 that they have received the written ruling from the Court. (Annexed herein and marked "SK-4" is a copy of the Ruling).
14. That I have been advised by my solicitors that my application was not heard and as such submission was not filed.
15. That I have a valid and meritorious grounds to Appeal and verily believe that I will succeed in my appeal if allowed. I have a valid agreement and are as follows:
 - i) I bought the vehicle registration No. ED205 from one Mohammed Aslam who has migrated to New Zealand on 21st November 2006 after conducting a search with the Land Transport Authority and at the time no Bill of Sale was registered against the said vehicle No ED205.
 - ii) That I sold the said vehicle to the Respondent on 22nd February 2008 who then sold to one Sangeeta Lal on 15th July 2008. Ms Sangeeta Lal disposed the said vehicle on 21st July 2009.
 - iii) That the alleged Bill of Sale of Credit Corporation (Fiji) Limited was not registered with the Land Transport Authority.

- iv) That the said vehicle was not repossessed by the Credit Corporation (Fiji) Limited until on or about 21st July 2009 after almost 3 years when I bought the said vehicle.
- v) That Credit Corporation (Fiji) Limited need to join as a party to this action.
- vi) This action is substantially disputed and involves with laws which the tribunal has no jurisdiction to determine and hence the tribunal has exceeded its jurisdiction.
- vii) That I humbly request that leave be granted to me to Appeal the decision of the Tribunal out of time.

AFFIDAVIT IN OPPOSITION

[3]. In his affidavit in opposition the respondent Nilesh Nirmal Singh (“Singh”) deposes as follows:

- 1. I am the Respondent/Claimant in the Action herein.
- 2. In so far as the content of this affidavit is within my personal knowledge it is true, in so far as it is not within my personal knowledge, it is true to the best of my knowledge and information and belief.
- 3. I seek leave of this Honourable Court to refer to the Affidavit in Support of Sailesh Kumar filed on the 23rd day of June 2014 (hereinafter referred to as “the Affidavit”).
- 4. I deny the allegations contained in the paragraph 3 of the Affidavit and further say that the referee upon hearing both the parties then made a decision. The Appellant/Respondent had his chance to provide his defence to my claim but he failed to provide meritorious defence and thus the decision was made by the Referee.
- 5. Save as to admit the application for setting aside was made but I deny the allegations contained in the paragraph 4 of the Affidavit and say that the Respondent has failed to provide any defence to my claim.
- 6. I do not have any knowledge of the allegation contained in the paragraph 5 and 6 of the Affidavit and therefore deny the same.
- 7. I deny the allegations contained in paragraph 8 of the Affidavit and further say that the Magistrate considered the applications filed by the Appellant and the Affidavits filed by both parties. The Appellant failed to disclose any merit in his applications and also has failed to provide any basis for application for stay and his applications were clearly vexatious.
- 8. I do not have any knowledge of the allegations contained in the paragraph 9 – 14 of the Affidavit and therefore deny the same. I further reiterate paragraph 7 hereinabove.
- 9. I deny the allegations contained in the paragraph 15 of the Affidavit and further say as follows:
 - 9.1 That I bought the vehicle No. ED 205 from the Appellant/Respondent for the sum of \$9,300.00 on the 22nd of February 2008.

- 9.2 The Appellant/Respondent advised me that the vehicle is free of all encumbrances.
- 9.3 The Appellant/Respondent ought to have known that the vehicle was under the Bill of Sale to Credit Corporation Fiji Ltd.
- 9.4 That the Appellant/Respondent represented that the vehicle was free of any encumbrances.
- 9.5 The Bill of Sale was registered on the 4th day of May 2005. I bought the vehicle from the Appellant/Respondent on or about the 22nd day of February 2008. A copy of the bill of sale is annexed hereto and marked as annexure 'NNSI'.
- 9.6 That the vehicle No. ED 205 was incumbent to Credit Corporation (Fiji) Ltd before I purchased the vehicle.
- 9.7 The Appellant/Respondent fraudulently sold the incumbent vehicle to me.
10. The Referee has made decision fairly upon hearing both parties and with the evidence provided by both parties at the hearing of the matter.
11. The Appellant/Respondent is just repeating the contents of the Affidavit which he has raised in his setting aside and application for leave to Appeal in Nadi Magistrates Court which was dismissed as the said applications lacked merits and basis for application was clearly vexatious.
12. The Appellant/Respondent has again failed to provide his defence on merit in his application and therefore should be struck out with costs to me.
13. The Appellant/Respondent has failed to provide his grounds of appeal and therefore the application should be struck out with costs to me.
14. The Appellant is simply avoiding to pay the Judgment sum of \$4,800.00 to me. I have been prejudiced by this delaying tactic of the Appellant and I am incurring additional costs in defending vexatious applications by the Appellant.

REPLY

[4]. Kumar swore and filed an affidavit in reply in which he deposes as follows:

1. That I am the Appellant herein – the original Respondent and Defendant in the Small Claim Tribunal and Magistrate's Court respectively.
2. That I swear to the facts herein as within my personal knowledge and in so far as other matters not within my personal knowledge, they are true to the best of my knowledge, information and belief.

History of the Vehicle ED 205

3. That the 1st owner of the said vehicle was Janif Tarana –

(See LTA Search marked as "SK 1")

4. That the various people submitted herein below were owners of the said vehicle Tahir Mohammed, Mohammed Aslam, Kumar Sailesh, Singh Nilesh, Lal Sangeeta and Ram Amitesh. (See copy of the said vehicle owners marked as SK 1 above).

5. That when Sangeeta Lal held the vehicle, the Credit Corporation, came to seize the vehicle from her on the basis as owner of the said vehicle based on the Bill of Sale registered on the 4th May 2005 – (See NNS 1 of Respondent Affidavit).
6. That the said Bill of Sale was never registered in the Land Transport Authority Vehicle Record as required by law – see Sections 7, 8 and 10 of the Land Transport (vehicles registration and construction) regulation 2000.
7. That when I bought the vehicle from Mohammed Aslam who assured me that the vehicle was free with a copy of the Search Record showing no financial interest in the vehicle outstanding.

(See SK 1”)

8. That upon doing my own search. I was given the same Search Record which was shown to me by Mohammed Aslam.
9. That the same procedures were followed by other buyers after me, ensuring that the vehicle was free by Checking the LTA Record.
10. That it was only through Sangeeta Lal that the presence of Bill of Sale came to light after the said vehicle passed through four owners.

Affidavit in Response

11. That as to paragraphs 1, 2 and 3 of the Respondent’s Affidavit, I do not need to comment on the same (the said Affidavit)
12. That as to paragraph 4 of the said Affidavit the Appellant says as follows:
 - (i). that there was no written ruling made by the Referee

(Enclosed is a copy of our letter asking for Ruling marked “SK 2”)

- (ii) that instead of the ruling the Referee made Orders only dated the 25th day of November 2013.

(Enclosed is a copy of the said Order marked “SK 3”)

- (iii) that subject of Bill of Sale was raised in both the hearing dates, of the matter; and demanded the Applicant to produce the Bill of Sale to justify his claim against me but was never tendered as evidence

(see NNS 1 – copy of Bill of Sale of the Respondents Affidavit)

- (iv) that I asked for all documents in SCT Record and there was no written Ruling given

(Enclosed are copies of the SCT file Record marked “SK 4”)

13. That as to paragraph 5 of the said Affidavit, I reject the contents therein and further say that I had tendered the Search Certificate of LTA and same did not contain any outstanding financial interest in the said vehicle.
14. That as to paragraph 6 of the said Affidavit I reiterate my stand deposed in my Affidavit in Support of this application.
15. That as to paragraph 7 of the said Affidavit I maintain my stand in my original Affidavit.
16. That as to paragraph 8 of the said Affidavit I reiterate my stand in my main Affidavit in Support.

17. That as to paragraph 9 of the said Affidavit I deny the contents therein and reiterate paragraph 15 of my Affidavit in Support.
18. That as to paragraph 10 of the said Affidavit I reject the contents therein and further say that the referee was biased and never considered my evidence which is the clearance from LTA for the said vehicle.

Magistrate's Court Action

19. That on the 20th day of February 2014, the Respondent applied in person by way of Notice of Motion seeking various orders chiefly that the execution of the Small Claims Tribunal Judgment more particularly the JDS be stayed pending the hearing of this application and also the judgment entered on the 23rd February be set aside and leave be granted to the Defendant to defend this action, after some 2 ½ months of the giving of the order in SCT.

(Enclosed are copies of the said Summons and Affidavit in Support marked "SK 5")

20. That after one month, in April 2014, another application was filed by the Defendant/Respondent by way of Notice of Motion dated 31st March 2014 seeking the Honourable Court for leave to file grounds of Appeal out of time.

(Enclosed are copies of the Motion and Affidavit in Support marked "SK 6")

21. That both Applications were dismissed by the Magistrate's Court with costs of \$500.00 (Five Hundred Dollars) to the Judgment Creditor.

(Enclosed is a copy of the judgment marked "SK 7")

22. That as regard to the Respondent claim the proper person to sue would be the Credit Corporation (Fiji) Ltd.
23. That in light of the above I seek order in terms of my application.

THE PRINCIPLES

- [5]. In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially. Gates CJ in McCaig v Manu (unreported CBV 2 of 2012 delivered 27 August 2012) sets out the following factors to ensure a principled approach to the exercise of the discretion:

(a) length of delay

(b) reason for delay

(c) whether there is a ground of merit justifying the appellants court consideration.

(d) Where there has been substantial delay, nonetheless, is there a ground of appeal that will probably succeed.

(e) if time is enlarged, will the respondent be unfairly prejudiced.

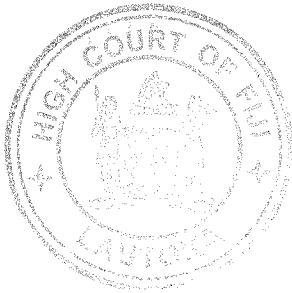
ANALYSIS

- [6]. After considering all, I have decided to refuse the application. My decision is based entirely on grounds (c) and (d). I am of the view that there is no merit to the intended appellant's case.
- [7]. The affidavits filed suggest that when Kumar acquired the said vehicle from the previous owner, Mohammed Aslam, he was assured by Aslam that the vehicle was free of any encumbrance. Kumar conducted a search at the LTA which seemed to confirm what Aslam had told him. There was no bill of sale registered against the vehicle. It was that oversight that enabled Kumar to buy the vehicle from Aslam and to later sell the vehicle to Singh, who later sold it to one Lal Sangeeta. It was when the vehicle was in the hands of Lal Sangeeta that Credit Corporation acted and seized the vehicle pursuant to its purported Bill of Sale. This of course, came as a surprise to everyone as the Bill of Sale was not registered. Sangeeta Lal was able to recover her losses from Singh. Singh then sought to recover his losses from Kumar. The SCT tribunal decision in question ruled in favour of Nilesh Kumar Singh.
- [8]. In my view, the Tribunal was entitled to the ruling it made considering that the jurisdiction it exercises is an **“equitable and good conscience”** jurisdiction and considering that it is not bound by the law and/or by the strict laws of evidence, and considering also that the grounds of appeal against the SCT decision are rather limited. In a nutshell, Singh could only

recover from Kumar rather than from Credit Corporation or from Aslam because he did not deal with them.

[9]. Kumar would be better advised to seek legal advice about filing a claim against Aslam and Credit Corporation.

[10]. Application dismissed. Costs to the respondent Nilesh Singh which I summarily assess at \$200-00 (two hundred dollars only).



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Anare Tuilevuka
JUDGE

24 February 2015.