

IN THE HIGH COURT OF FIJI
AT LAUTOKA [Western Division]
APPELATE JURISDICTION

CIVIL APPEAL No. 4 of 2015

*(IN THE APPLICATION FOR
LEAVE TO APPEAL OUT OF TIME)*

*(Original RakiRaki Magistrate's
Court Civil Action No. 08 of
2009 & Action No. 09 of 2009)*

BETWEEN: **DAMODAR NAIDU** *of Mullau, RakiRaki, Cultivator.*

APPELLANT
(Original Plaintiff)

AND: **RANJEET SINGH** *of Mullau, RakiRaki, Cultivator.*

RESPONDENT
(Original Defendant)
(Action No. 08/09)

AND: **MANPREET SINGH** *of Mullau, RakiRaki, Cultivator.*

RESPONDENT
(Original Defendant)
(Action No. 09/09)

Before : Hon. Mr. Justice S. S. Sapuvada

Counsels : Ms. Natasha Khan for Appellant
 Respondent not present & not represented

Date of hearing : 29 April 2015

Date of Ruling : 05 May 2015

RULING

INTRODUCTION

1. The Appellant (***Original Plaintiff of RakiRaki Magistrate's Court Action No. 08 of 209 & No.09 of 2009***) has instituted the present Action in this Court by way of an ***Ex Parte Notice of Motion*** for Leave to file Appeal out of time pursuant to Order 59 Rule 10 of the High Court Rules(HCR) and under the Inherent jurisdiction of the High Court(as mentioned in the ex parte Notice of Motion), in order to:
 - (a) Enlarge the time period for filing and serving a notice of Appeal.
 - (b) Stay of Execution of the Ruling dated 20th July 2013 until the determination of this Application/ the substantive Appeal, and
 - (c) Or such any other orders that is just and equitable and within the Inherent Jurisdiction of this Court.

HISTORY OF THE CAUSE

2. Originally, the RakiRaki Magistrate's Court made a Ruling on **20th July 2011**, in both the Action No. 08 of 2009 and No. 09 of 2009 dismissing the Appellant's claim in the Magistrate's Court.
3. The Appellant had then on **27th July 2011** filed a notice of intention,(in the Magistrate's Court of RakiRaki)to appeal against the said ruling pursuant to Order XXXVII rule 1 of the Magistrate's court Rules Cap 14 (MCR).
4. The Appellant however had failed to file the grounds of appeal within the stipulated period of one month [***under Order XXXVII, rule 3.-(1) of MCR***] from the date of said original ruling of the Learned Magistrate

5. Then, on **29th April 2013** the Appellant by way of a motion supported by an affidavit, filed an application in the Magistrate's Court for **extension of time** to file the grounds of appeal pursuant to order XXXVII rule 4 of the MCR.
6. The Magistrate's Court delivered a **Judgment** on **26th February 2015** making orders as follows:
 - (i) *“Applicant is granted leave to file out of time his grounds of appeal within 14 days from today subject to costs being paid.*
 - (ii) *Due to the long delay I will order costs of \$350.00 each to be paid to the respective respondents within 14 days.*
 - (iii) *If costs are not paid within the stipulated time then the appellant is deemed to have abandoned his appeal”.*

(emphasis & italic is mine)

7. The Appellant having failed to honor the terms clearly read over by the Magistrate's Court by its Order dated 26th February 2015, filed the present application in this Court by way of an ex parte Notice of Motion dated 25th March 2015, seeking the leave of the Court to file his appeal out of time for the **second time**.

APPELLANT'S PRESENT APPLICATION

8. The Appellant, in the last paragraph of his Ex Parte Notice of Motion dated 25th March 2015 filed through his Solicitors for **leave to file appeal out of time**, has clearly stated that, the present application is made pursuant to **Order 59 Rule 10** of HCR and under the **Inherent Jurisdiction** of this Court.

RELEVANCY OF ORDER 59 TO THE PRESENT CASE

9. Order 59 splits into two Parts which deals with '**Master of the High Court**'.
10. **Part I** of Order 59 deals with the '**Jurisdiction of the Master**', and

11. **Part II** deals with '**Appeal from the Master**'.
12. Now it is important to look at the very provision of the HCR under which the Appellant has invoked the jurisdiction of this Court in the present application
13. The Appellant has brought the present application to this Court as mentioned in paragraph 8 above.
14. The Order 59, rule 10 is as follows:

"Extension of time (O.59, r.10)

10-(1) *An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single Judge after the expiration of that period.*

(2) *An application under paragraph (1) shall be made by way of an inter-parte summons supported by an affidavit."*

15. Therefore, it is as clear as crystal that the Appellant's ex parte Motion in this case does not fit in and cannot be entertained under Order 59, rule 10 of the HCR, since the Order 59 speaks only about the Jurisdiction of the **Master** & appeals from the Master, and yet the Appellant has sought the leave of this Court in order to enlarge time for filing an appeal out of time against a Judgment of the **Magistrate's Court**.
16. Therefore, the Appellant's present application does not fall within the ambit of the provision of Order 59 of HCR, and thereby this Court cannot take cognizance of the same under Order 59, Rule 10, and thus resulted in negating the short avenue sought for by the Appellant to enter into the path of appealing against the Ruling originally made by the Magistrate's court on 20th July 2011.

MAGISTRATE'S COURT RULES

17. I will now have a look at the Magistrate's Court Rules pertaining to the present application, in order to explore myself to see whether there is any possibility of considering the same in fairness to the Appellant's grievance before me.
18. Order XXXVII rule 1 of the Magistrate's Court Rules Cap 14 (MCR) deals with the Civil Appeals from the Magistrate's Court.
19. "RC 1" referred to in the Affidavit of Rajneel Chandra, is a copy of the Judgment of the Magistrate's Court of RakiRaki dated 26th February 2015.
20. Learned Magistrate, having given the attention to the provision of the MCR and to the relevant case law, and having correctly followed the procedure in considering the Appellant's application for leave to file his grounds of appeal out of time delivered the Judgment as mentioned in Para 6, i, ii, and iii, above.
21. The Magistrate's Court, by the said judgment has once granted leave to file the grounds of appeal out of time extending 14 days from the date of Judgment dated 26th February 2015, with terms to be honored by the Appellant, and in failing with, shall be deemed to be abandoned the appeal.
22. Therefore, the calculation of 14 days within which the Appellant to file his grounds of appeal having extended once by the said Judgment, commences from 27th February 2015 and ends on 12th March 2015, since the year 2015 is not a leap year.
23. However, the Appellant has failed to comply with the Order of the Magistrate's Court, which eventually made the Appellant deemed to have abandoned the appeal in view of both the effect of Order of the Magistrate's Court as per Para 6 above, and the mandatory effect of the Provision provided for in such a situation under Order XXXVII, rule 4 of MCR.

24. The Appellant having failed to comply with the terms stipulated by the said Judgment, again for the second time filed the present application seeking the Orders from this Court for leave to file appeal out of time as mentioned in Para 7 above.

25. It is indeed noteworthy to have a look at the Order XXXVII, rule 4 of the MCR in order to examine the mandatory nature of effect of the provision relevant to the present application before this Court.

26. **ORDER XXXVII, RULE 4 OF MCR**

“Effect of failure to file grounds of appeal

4. On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.”

27. It needs no further explanation to be given as to what is the effect of non-compliance with the provision provided in Order XXXVII, rule 4., of the MCR

28. The Appellant shall be deemed to have abandoned the appeal, upon the appellant failing to file the grounds of appeal within the prescribed time.

29. The Magistrate’s court has once granted the leave to file grounds of appeal out of time acting under the provisions of Order XXXVII, rule 4.

30. The rule 4 provides only once for the Court below or the Appellate Court to see whether it is fit to extend the time to file the grounds of appeal in any given case.

31. The Magistrates court has already exercised the discretion vested by rule 4 of MCR as reflects in Para 26 above.

It is important to note that the wordings of the Order XXXVII, Rule 4 of MCR are very comprehensive nature. i.e.: ***unless the court below or the***

appellate court shall see fit to extend the time.”

(emphasis mine)

32. The word “ or ” between “ *the court below* ” and “ *the appellate court* ” above, plays an important and drastic role to mean that it is only by one court of law, either the court below or the appellate court shall see it, fit to extend the time, but not by one court after and/or before the other.

(emphasis mine)

33. Having given that thought, it seem to me that the opportunity is very narrow for the appellant to invoke the Inherent Jurisdiction of this court in succeeding the present application for the second time to enlarge the time for filing the appeal out of time for the very reasons I append below in this Ruling.

REASONS SET OUT IN THE MOTION

34. The Appellant in his application to this Court for “leave to file appeal out of time”, has not filed an Affidavit in support of his Ex Parte Notice of Motion and instead, deposed the grievance through a Law Clerk, named Ranjeel Chandra of Vuda Point, Lautoka.
35. This Court, having observed the fact that the appellant has instituted the present cause by way of an ex parte notice of Motion, converted it to inter partes and caused the Appellant to serve notice to the Respondent.
36. The Affidavit of service of the same was filed by the Appellant through Ranjeel Chandra, Law Clerk of Vuda Point, Lautoka.
37. The Counsel for the Appellant at the hearing submitted that the appellant does not intend to file an affidavit of his own, and yet relies only upon the Affidavit of Rajneel Chandra, a Law Clerk of Natasha Khan Associates.

38. Rajneel Chandra in his affidavit states the sequence of events as follows:

**“ AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION
FOR LEAVE TO APPEAL OUT OF TIME**

I, RAJNEEL CHANDRA of Vuda Point, Lautoka, Litigation Clerk make oath and say as follows:-

1. *I am the Law Clerk of Natasha Khan Associates and was involved in the filing of this Appeal and am instructed and duly authorized by the Appellant to make this Affidavit on his behalf.*
2. *On 26th February, 2015, a copy of the Judgment was obtained from the Rakiraki Magistrate’s Court. A copy of the same is annexed herewith and marked as annexure “RC 1”.*
3. *The Honorable Court ordered to the Appellant that in his view and based on aforesaid mentioned discussions that leave should be granted to file Appellant’s Grounds of Appeal out of time but subject to costs which has to be paid to Respondents which are as follows:*
 - i) *That the Appellant is granted leave to file out of time his Grounds of Appeal within 14 days from today subject to costs being paid.*
 - ii) *Due to the long delay the Honorable Court ordered that cost of \$ 350.00 each be paid to the Respondents within 14 days.*
 - iii) *If costs are not paid within the stipulated time then the Appellant is deemed to have abandoned his Appeal.*
4. *That I was given responsibility to have the same filed, which I failed to do so as the Judgment was over sighted by me and according to my understanding, the cost was to be paid within 14 days from the date of Judgment and Notice of Grounds of Appeal to be filed after.*
5. *It was only then when our Ms. Khan started enquiring about the filing of Notice and Grounds of Appeal that I discovered the same was to be filed within 14 days for the date of Judgment.*

6. *That the cost was paid to the Respondent's Solicitor's Trust Account on the 12th day of March, 2015 and our office was waiting for the confirmation. Upon our several enquiries, a confirmation of our deposit was received through e-mail on 20th March 2015 and then we attempted to file our Notice and Grounds of Appeal and the Court Registry refused to accept the same. Copies of our deposit slip and e-mail are annexed hereto and marked as annexure "RC 2".*
7. *That I have realized that the Notice and Grounds of Appeal which was out of time was to be filed within 14 days from the date of Judgment subject to costs being paid.*
8. *I apologise to this Honorable Court for the error in misreading the Judgment and for an oversight on my part on behalf of my office and I further state that no disrespect was inherited to this Honorable Court.*
9. *I verily believe that the Notice and Grounds of Appeal are meritorious and have high chance of success. A copy of the Notice and Grounds of Appeal which we intend to file is annexed hereto and marked as annexure RC 3".*
10. *I pray to the Honorable Court for Orders in terms of Motion filed herein."*

39. The very reason I re-produced the affidavit of Rajneel Chandra is to emphasize the fact that, entire weight of the Motion of the Appellant in his application has put on & relied upon the narration forwarded by the Law Clerk from Para 1 to 10 in his affidavit as above.
40. The Appellant's reasons for delay in making the payment of cost and filing the grounds for Appeal only confined to some facts which are not pertaining to the personal knowledge of the Deponent (No.3 first Para of the Affidavit).
41. The other facts mentioned by the Law Clerk in the affidavit are frivolous to be submitted to a Court of Law.

42. The factors needed to be considered when dealing with an application of similar nature were highlighted in the Case of **AG v SHARMA (ABU 0041.93S)** by the Fiji Court of Appeal as follows:
- The reason for the failure to comply:
 - The length of the delay:
 - Is there a question that justifies serious consideration:
 - If there has been substantial delay, do any of the grounds urged have merit that would probably succeed: and
 - The degree of prejudice to the respondent in enlarging time.
43. It was also pointed out in the said Judgment that it is not necessary to deal with each factors “willy nilly”.
44. In considering the guidelines enunciated in AG v Sharma (supra), on one hand:, I see no merit what so ever in the reasons deposed by the Affidavit of Law Clerk to be considered in enlarging the time for the second time in the same appeal, except for his own negligence by misreading the Judgment and/or noncompliance with the Order of Learned Magistrate who once extended the time which the Applicant has taken for granted.
45. The other; the admissibility of affidavits of Law Clerks is a serious question to be answered.
46. The Appellant in this application did not swear in the Affidavit by himself.
47. Instead, the only Affidavit on behalf of the Appellant has been sworn by a law clerk of Natasha Khan Associates, the Appellant’s Law Office.
48. In *Repeni Sulimuana Momoivalu v Telecom (2006)(Unrep) Suva High Court Civil Action No: 527/1997s* where His Lordship, Mr. Justice Winter, in

respect of affidavits deposed by the lawyers' clerks had this to say at page 3 & 4 of the Judgment:-

“The habit of supporting or opposing applications to decide the rights of parties based on the information and belief of law clerks is an embarrassment to the clerk, her firm and the court file. Justice Madraiwiwi (as he then was) had this to say about the practice of using law clerks in this way:

“It is being made clear to counsel that affidavits by law clerks were not being entertained other than in non-contentious matters such as service of documents were not disputed. The most appropriate person to have sworn the affidavit in these proceedings was Mr Joji Boseiwaqa who appeared on instruction from the plaintiff as the relevant time. The court respectfully endorses the general thrust of dicta by Lyones J in Michael Harvey v Michael Kelly & Ray McGill, Civil Action No, HBC 323 of 1977 about the propriety of law clerks dispensing affidavits”.

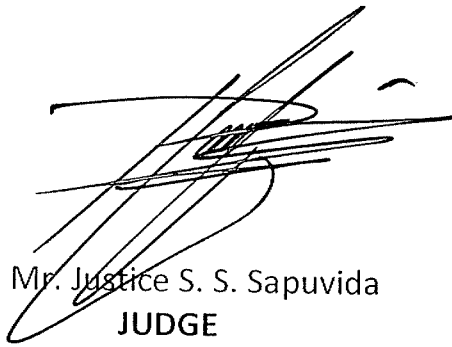
The affidavit barely engages the applicant defendant in many meaningful ways is in any event quite illegitimate. Although the Defendant has in part responded to his document by the law clerk I intend to give it absolutely no weight whatsoever.”

(Emphasis & Italic is mine)

49. In the present application the appellant has not deposed any reason as to why he was unable to file his grounds for appeal even after it was extended by the Magistrate's court.
50. For the foregoing reasons I cannot find a reasonable ground in the ex parte notice of motion and affidavit of the Appellant filed before me to grant an enlargement of time to file notice of Appeal and the other reliefs prayed for in the same.

51. Hence, I make the following Orders;

- (a) Application for enlargement of time period for filing and serving a Notice of Appeal is dismissed.
- (b) Application for stay of execution of the Ruling dated 20th July 2013 is refused
- (c) The Appellant's Notice of Motion dated 25th March 2015 is dismissed without cost.



Hon. Mr. Justice S. S. Sapuvida
JUDGE

At Lautoka.
05th May 2015