

IN THE HIGH COURT OF THE REPUBLIC OF FIJI

AT LAUTOKA (WESTERN DIVISION)

[CIVIL JURISDICTION]

Civil Action HBA 10 of 2014

IN THE MATTER of an application for leave to Appeal out of Time.

AND IN THE MATTER of the decision of Civil Case between Anand Nilesh Kumar and Nazia Farina Bano

BETWEEN : **NAZIA FARINA BANO** of Tomuka, Lautoka, Occupation Unknown to the Respondent.

DEFENDANT/APPLICANT

A N D : **ANAND NILSEH KUMAR** of 47 Ratu Meli Road, Lautoka, Businessman

PLAINTIFF/RESPONDENT

Appearances

Applicant in person

Mr W Pillay for Respondent

Date of Hearing: 23 April 2015

Date of Ruling : 12 May 2015

R U L I N G

Introduction

[1] This ruling relates to an application for leave to appeal out of time.

[2] By a notice of motion dated and filed 4 November 2014 in person [‘the application’], the applicant, Nazia Farina Bano (defendant in the court below) seeks the following orders:

1. *That the judgment from the Magistrates Court No.1 was in favour of the Respondent.*
2. *That as my defence counsel namely Iqbal Khan and Associates were debarred from practicing his law firm, the judgement was made against me in favour of the respondent.*
3. *I am well prepared to provide all necessary documents in relation to my appeal without a further notice.*

[3] The application is supported by an affidavit sworn by the applicant.

[4] It ought to be noted that the application states only the grounds for seeking the order the applicant intended to seek from the court. The application fails to states what the order the applicant is applying for.

[5] The application is opposed. Respondent, Anand Nelesh Kumar (plaintiff in the court below) filed his affidavit in opposition sworn on 12 March 2015. The affidavit annexes a copy of the judgment of the Magistrate’s Court at Lautoka dated 30 July 2014. The respondent has taken some two months to file his affidavit in opposition. The application, according to affidavit of service filed in court, was served on the respondent’s solicitors (Gordon & Company) on 13 January 2015, but the respondent’s affidavit was filed only on 12 March 2015.

[6] At hearing, both parties orally made submissions. Neither party made application to file written submissions.

Background

[7] The respondent brought a civil action against the applicant in the Magistrate’s Court at Lautoka under action No. 115 of 2011. The action was founded on an alleged oral contract between the respondent and the applicant. On 30 July 2014 the learned Magistrate, after trial in which the applicant participated through her counsel, delivered judgment in favour of the respondent granting general damage in the

sum of \$33,390.06 together with summarily assessed costs at \$2,000.00. The applicant has made her application to this court for leave to appeal out of time on 4 November 2014 which is about two months late.

Legislative framework

[8] The applicant seeks leave to appeal out of time against the decision of the Magistrate's Court. So, **Magistrate's Court Rules** ('MCR') apply in the circumstance. The **MCR O.37, r 3 (1)** provides as follows:

*'3.-(1) The appellant shall **within one month from the date of the decision appealed from**, including the day of such date, **file in the court below the grounds of his appeal**, and shall cause a copy of such grounds of appeal to be served on the respondent (Emphasis added).'*

[9] The effect of non-compliance with r.3 (1) is explained in MCR O.37, r.4 which states that:

*'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** (Emphasis added).'*

Principles Governing Extension of Time

[10] Each application must be viewed by reference to the criterion of justice, and it is important to bear in mind the time limits are there to be observed, and justice may be seriously defeated if there is any laxity in this regard, see para 71.22, *Blackstone's Civil Practice 2011*. The court should give particular weight to the prospect of success on the appeal (*Southern and District Finance plc v Turner [2003] EWCA Civ 1574, LTL 7/11/2003*).

[11] The principles laid down by Fiji Court of Appeal in **Attorney- General of Fiji v Sharma** [1995] FJCA 30; ABU0041.93S (17 May 1995) on extending time for appealing;

- (i) The reason for the failure to comply
- (ii) The length of the delay
- (iii) Is there a question which justifies serious consideration?
- (iv) If there has been substantial delay, have any of the grounds such merit that they will probably succeed?
- (v) The degree of prejudice to the Respondent in enlarging time.

[12] In Sharma's case the Fiji Court of Appeal further said that, it is not always necessary to deal with each of these factors willy-nilly. For, as was said in **Palata Investments v Burt Sinfield** (1985) 2 All ER 517 at 521, where the delay is slight, it is generally unnecessary to go into the merits. By the same token if the delay is substantial and the Appellants are unable to give a reasonable explanation for the delay and there are no questions requiring serious consideration by the highest judicial tribunal in the land, the Court is not obliged to deal with every factor. In our view the delay here is substantial, the explanation given for the delay is unsatisfactory and there are no important questions of law requiring the Supreme Court's attention. Furthermore the prospects of success, if any, are minimal.

[13] The application seeks leave to appeal out time in a civil case. In **McGaig v Manu** CBV.002.2012 (27/8/2012), Gates P (as he was then) distinguishing applications to extend time made in criminal and civil cases he said:

*“9. It must be remembered that whilst in a compelling case the Court may more easily be convinced of a need for intervention in a criminal case with less regard for the prejudice caused to the State as Respondent, the position is different in a civil case. **In such cases when exercise civil jurisdiction, the appellate courts have tended to be less lenient, than when considering the position of an accused person who lodges a late appeal. In civil appeals the Court has to be more even-handed and consider equally the rights and interests of the Respondent with those of the applicant** (Emphasis added).”*

[14] I will attempt, where necessary, to apply these principles to the application before me.

Discussion

[15] The applicant seeks leave to appeal out of time against the judgment of Magistrate's Court. The judgment was delivered on 30 July 2014. Upon perusal of the record of the proceedings, I found that the applicant had in fact filed the grounds of appeal on 26 August 2014 which is well within the prescribed time.

Filing Grounds of Appeal

[16] To appeal a decision of a Magistrate's Court, the appellant must file the grounds of appeal in the Magistrate's Court **within one month** from the date of the decision appealed from (MCR, O.37, r. 3 (1)). The applicant had complied with this requirement by filing the grounds of appeal within the prescribed period. But then, why has she filed this application seeking leave to appeal out of time? It is not clear why she filed the current application in this court.

[17] Normally, an application for leave to appeal out of time is heard without record of the Magistrate's Court proceedings being available. In this case, entire record of the Magistrate's Court is available before the court. This is because the applicant had filed her grounds of appeal in the Magistrate's Court within time.

Transmission of Record

[18] Upon the filing of grounds of appeal, the record of appeal is to be transmitted to the High Court by the Magistrate's Court. The Magistrate's Court is required by **O.37, r.7, MCR** to make up the record of appeal within 7 days from the filing of grounds of appeal and forward to the High Court. Rule 7, MCR provides as follows:

'7. Within seven days from the filing of grounds of appeal, the court below shall, without the application of any party, make up the record of appeal,

which shall consist of the writ of summons, the pleadings (if any), all documents admitted as evidence or tendered as evidence and rejected, the notes of the evidence, the judgment or order of the court below and the grounds of appeal. The record of appeal, when completed, shall be forwarded to the Chief Registrar or clerk of the appellate court as the case may be.'

[19] Since the grounds of appeal being filed within the prescribed time the Magistrate's Court, in compliance of r.7, had made up the record of appeal and forwarded the same to this court.

Notice to parties

[20] The Chief Registrar or clerk of the High Court must give notice of the date of hearing to the parties to the appeal as required by **O.37, r.12, MCR** which reads:

'12. If the appeal is from a final judgment or decision, the Chief Registrar or clerk of the court of the appellate court, as the case may be, shall give notice of the date of hearing to the parties to the appeal.'

[21] The applicant intends to appeal against the final judgment of the Magistrate's Court. The record of appeal has been transmitted to this court. So, the Deputy Registrar or clerk of the court should have given notice to the applicant without any notice of motion (for direction) being filed by the applicant. It would be incorrect to request the appellant to file a notice of motion to move his or her appeal against a final judgment of the Magistrate's Court. If such practice is followed, that must stop forthwith. That may be relevant in appeal from the Master because O.59, r.17 of the High Court Rules 1988 requires that, the appellant shall, within 21 days of notice of appeal, file and serve a summons returnable before a judge for direction and a date for hearing of the appeal. This procedure, in my opinion, will not apply to an appeal from the Magistrate's Court against a final judgment or decision.

Notice of Intension to Appeal

[22] An appellant who wishes to appeal against the decision of the Magistrate's Court must give notice of intension to appeal to the respondent and to the court within 7 days after the day on which the decision appealed against was given. Such notice may also be given verbally to the court in the presence of the opposite party after the judgment is pronounced. The **MCR, O.37, r. 1** explains when and how such notice of intension to appeal should be given. That rule provides as follows:

'Every appellant shall **within seven days after the day on which the decision appealed against was given**, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intension to appeal:

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced (Emphasis added).'

[23] I am in dark as to whether the applicant filed the notice of intention to appeal within 7 days as required by O.37, r.1, MCR. It will be noted that the MCR do not provide effect of failure of the appellant to file the notice of intention to appeal within the time prescribed like providing provision with regard to effect of failure to file grounds of appeal. I will not say more than this because there was no argument before me in this regard.

Reason for delay

[24] It will be enough for the court to consider the reason for the delay and the steps taken prior to the application to extend time being made.

[25] Mr Pillay, counsel for the respondent contended that the applicant fails to state reasons for the delay hence the application for leave to file out of time ought to be dismissed. This argument would fail, for in **Hyams v Plender** [2001] 1 WLR 32 at [15]) it was held that:

'Failure to state reasons for the delay in the appellant's notice, contrary to PD 52, para. 5.2) should not in itself be a reason for refusing an extension when there are in fact reasons for delay.'

[26] The applicant intends to appeal a final judgment delivered by the Magistrate's Court on **30 July 2014**. The learned magistrate at the end of her judgment states that, '**28 days to appeal**'. The 28 days expires on **26 August 2014**. The applicant had filed her grounds of appeal on **26 August 2014**, i.e. within the time allowed for appeal. In the circumstances I do not find any delay in the filing of the grounds of appeal. The applicant therefore may appeal as of right under s.36 (1) (a) of the Magistrates' Court Act.

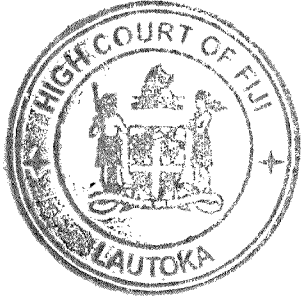
Conclusion

[27] The impugned judgment was delivered by the Magistrate's Court on 30 July 2014. 28 days allowed for filing the grounds of appeal expires on 26 August 2014. On that day which is within 28 days from the date of judgment the applicant had filed her grounds of appeal. Hence there was no delay on the part of the applicant in the filing of the grounds of appeal. As the grounds of appeal are filed within the time permitted, there is no need to extensively consider the principles governing the application to extend the time for appeal. I would therefore allow the appeal to take its normal course. The appellant may file and serve additional or amended grounds of appeal, if need be, within 14 days from today (12 May 2015). I set down the appeal for hearing at 9.30am on 21 August 2015. In the circumstance of the case I make no order as to costs.

Final Outcome

1. The appeal will take its normal course.

2. The appellant will file and serve additional or amended grounds of appeal, if need be, within 14 days from today (12 May 2015).
3. The appeal is set down for hearing at 9.30am on 21 August 2015.
4. No order as to costs.



M H Mohamed Ajmeer

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M H Mohamed Ajmeer

JUDGE

At Lautoka

12 May 2015