

In the High Court of Fiji at Suva

Civil Jurisdiction

Civil Appeal HBA No. 26 of 2012

Between: Abdul Khaiyum Sheikh

Appellant

And: Kasabias Limited

Respondent

Appearances : Ms A Rokomokoti for the appellant

Mr Nilesh Prasad for the respondent

Date of hearing: 8th February, 2013

JUDGMENT

1. This is an application seeking extension of time to appeal and stay a judgment of the Magistrates' Court.
2. In his affidavit in support, the appellant states that :
 - (a) Neither he nor his counsel was present, when the judgment was delivered on 20th December, 2011.
 - (b) He made a request for a copy of the judgment from the Nasinu Court Registry on two occasions. The judgment was not ready. His lawyer was overseas. He states that he required the judgment, in order to instruct his counsel to appeal. He obtained a copy of the judgment on 6th January, 2012, and instructed a "*new counsel*" to seek leave to file out of time, notice of intention to appeal and grounds of appeal.
 - (c) He could not file notice of intention to appeal, as his "*original counsel*" was overseas, and the written judgment was not available on the day the judgment was pronounced.

3. Sequence of events

- (a) On 20th December, 2011, the lower court delivered judgment in favour of the respondent in a sum of \$9,821.52, costs and interest. The appellant was present in person.
- (b) On 3rd February, 2012, the appellant filed an application seeking leave to file Notice of Intention to Appeal, affidavit in support and grounds of Appeal in the Magistrates Court.
- (c) On 17 July, 2012, the Learned Magistrate held that it had no jurisdiction to grant leave to the appellant to file Notice of intention to appeal out of time; and the filing of grounds of appeal hinges on the successful filing of the Notice of intention to appeal out of time.

4. The determination

A party aggrieved with a decision of the Magistrates' Court is required by Order XXXVII r1 of the Magistrates Court Rules to file "*within seven days after the day on which the decision appealed was given, ... notice in writing of his intention to appeal*". The proviso states that such notice may be given verbally, in the presence of the opposite party .

The appellant's application to the lower court to file out of time, notice of intention to appeal and grounds of appeal was declined.

The Learned Magistrate, in his Ruling, cited the oft quoted case of *Crest Chicken Ltd v Central Enterprises Ltd*, (2005) FJHC 87. In that case, Pathik J held that the provisions of Order XXXVII, r 1 are mandatory. There is no provision for extension of time to give notice of intention to appeal.

More recently, Wati J in *Fiji Posts and Telecommunications Ltd*, (HBA 003 of 2000L) held that Or11, r 2 of the Magistrates Court Rules titled "*Enlargement or Abridgement of Time*" enables an application to be made for extension of time to file notice of intention, provided the applicant had made an attempt to obtain the consent of the other party.

Wati J stated that in the absence of a specific provision, the Court can rely on the general provision, to consider the application for extension of time.

The reasoning in that judgment appeals to me, in the light of Or11,r 9 which provides that a court shall have power “*to enlarge or abridge the time appointed by these Rules..*” However, a party applying for an extension of time has to provide a satisfactory explanation for his delay.

I move on to the next application. This is for an extension of time to file grounds of appeal. Or XXXVII, r 3 states that the appellant shall file “*within one month*” the grounds of appeal in the court below. The ensuing r 4 states that the time period may be extended by the court below or the appellate court.

On this point, Pathik Jin *Crest Chicken Ltd v Central Enterprises Ltd*, (*supra*) referred to *Tevita Fa& Associates and Tradewinds Marine Ltd and Oceanic Developers (Fiji) Ltd*, (Civ App No. 40/94 FCA) where Thompson J A said:

..time-limits are set with the intention that they should be observed and even lateness of only a few days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above the applicant has given no explanation at all.

In *AG v Sharma*, (ABU 0041.93S) the FCA highlighted the following five factors to be considered, in an application for leave to appeal out of time, namely; (i) the reason for the failure to comply, (ii) the length of the delay, (iii) is there a question that justifies serious consideration, (iv) if there has been a substantial delay, do any of the grounds urged have merit that would probably succeed, and (v) the degree of prejudice to the respondent in enlarging time. The judgment of the Court stated that it was not necessary to deal with each of these factors “*willy nilly*”.

The first factor to be considered is whether the appellant has satisfactorily explained his delay, in filing notice of intention to appeal or grounds of appeal.

In the present case, the lower court delivered judgment on 20 December, 2011. The time period of 7 days to give notice of intention to appeal, (as stipulated in Or XXXVII, r1) expired on 28 December, 2011. I have perused the Magistrates Court file. The appellant was present in Court, when the judgment was delivered.

It would appear that both parties received a copy of the judgment on 6 January, 2012. The appellant contented that he required a copy of the judgment, in order to instruct his solicitor. On this argument, the 7 days period to file notice of intention to appeal expired on 13 January, 2012, as correctly pointed out by Mr Prasad, counsel for the respondent. The appellant filed this application to extend time on 3 February, 2012.

In my judgment, the appellant has failed to explain satisfactorily, his subsequent delay from 6 January, 2012, to 3 February, 2012. The filing of grounds of appeal hinges on the successful filing of the notice of intention to appeal, as observed by the lower court.

I do not find convincing the appellant's explanation that his counsel was overseas. As Mr Prasad submitted, he could well have retained another solicitor.

I turn to consider the proposed grounds of appeal which read:

- 1) *That the Learned Magistrate erred in law and in fact when his worship did not consider that there was no documentary evidence to show that the Appellant never purchased any items from the Respondent on credit.*
- 2) *That the Learned Magistrate erred in law and in fact when he did not properly consider the Statement of Defence of the Appellant.*
- 3) *That the Learned Magistrate erred in law and in fact when he did not properly analyse the sworn evidence on both sides, hence unfairly relying heavily on the Respondents evidence without proper and good reasons.*

- 4) *That the Learned Magistrate erred in law and in fact when his worship unfairly relied significantly on the Respondent's evidence without properly considering the sworn evidence of the Appellant at the trial at first instance.*
- 5) *That the Learned Magistrate erred in law and in fact when his worship unfairly relied significantly on the Respondent's evidence without properly and fairly balancing it against the case for the defence.*
- 6) *That the Learned Magistrate erred in law and in fact when he did not properly compare and distinguish the facts of this case from that of the case in Waiqele Sawmill Ltd –vs- Udumasi [1988] FJHC 13, a case which he cited in his decision.*
- 7) *That the Learned Magistrate erred in law and in fact when he did not properly apply the case law of Waiqele Sawmill Ltd –vs- Udumasi [1988] FJHC 13 in this case at first instance.*
- 8) *That the Learned Magistrate erred in law when his worship decided that corroboration of evidence by the Respondent and lack of corroboration of evidence by the Appellant was grounds for judging in favour of the Respondent.*
- 9) *That the Learned Magistrate erred in law and in fact when his worship gave considerable weight to the submission of the Respondent counsel without properly balancing it against the evidence adduced in favour of the Appellant.*

The respondent claimed monies owed for goods sold and delivered to the appellant. The appellant filed his defence and counter claim. The counter claim was struck out by consent. The appellant called three witnesses: the Credit Controller, a former branch manager and Assistant Accountant of the appellant company.

The appellant testified. He did not deny that he purchased goods from the respondent. The dispute, he said, was on the exact amount due to the respondent.

In my judgment, the lower court correctly evaluated the oral and documentary evidence adduced. It was found that all payments made by the defendant were incorporated in the reconciliation prepared by the respondent.

The Learned Magistrate had the benefit of observing the demeanour of the witnesses, as he noted in the judgment. He found credible, the evidence of the three witnesses for the respondent. In contrast, he did not believe the appellant.

An appellate court is reluctant to interfere with findings of fact made by a lower court, particularly when the findings turned on the credibility of witnesses: *Benmax v. Austin Motor Co., Ltd*, (1955) 1 All ER 326.

The appellant contends that the lower court did not apply the case of *Waiqele Sawmills Ltd v Udumasi*, (1998) FJHC 13 cited. In that case, the plaintiff failed to prove his claim to the satisfaction of the trial judge. Fatiaki J (as he then was) was satisfied that the lower court reached a correct finding on the evidence.

In my judgment, there are no merits in the proposed grounds of appeal. The prospects of success are minimal.

Finally on the question of prejudice, Ms Rokomokoti, counsel for the appellant argued that there was no prejudice caused to the respondent, if extension of time was granted.

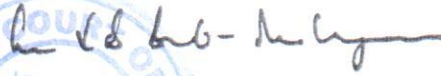
Mr Prasad's riposte was that the respondent has been denied the fruits of a judgment in his favour, in respect of a case filed in 2008. I accept this contention.

I decline the application for extension of time to appeal the judgment of the lower court of 20th December, 2011, and file grounds of appeal.

5. Orders

- (a) I decline the application for extension of time to appeal the judgment of the lower court of 20th December, 2011, and to file grounds of appeal.
- (b) The appellant shall pay the respondent a sum of \$ 2000 as costs summarily assessed within 21 days of this judgment.

21 January, 2015



A.L.B. Brito-Mutunayagam
Judge