

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBM 17 of 2014

BETWEEN : **SHAHEEM ALI** of Natadola, Sigatoka.

APPELLANT

AND : **ASAF ALI** of Batiri, Sigatoka

RESPONDENT

R U L I N G

1. Before me is a Summons for Leave to Appeal Out of Time filed by Shaheem Ali (“Ali”). The Summons is reproduced in full below:
 - a. That the Appellant be granted an Extension of Time to file Notice of Intention to Appeal and Grounds of Appeal.
 - b. That the Appellant be granted Leave to Appeal: and
 - c. That there be unconditional Stay of Execution of all proceedings by the Respondent pending determination of the Appeal.
2. The Summons is supported by an affidavit sworn by Ali on 12 August 2014. In that Affidavit, Ali deposes:
 1. That I am the above named Appellant and I make this Affidavit in Support of my Summons filed herein.
 2. That in so far as the contents of this Affidavit is within my personal knowledge it is true to the best of my knowledge and information and belief.
 3. That an Order was made on the 18th day of February, 2014 against me, the Appellant in this matter for non-appearance and failure to prosecute my case as the Defendant. An order is marked as annexure “SA 1”.
 4. That there was an oversight on my part for not remembering the date and I was unaware of Court proceedings.
 5. That after a few days I came to know that there was an Order issued by the Magistrate’s Court against me. Upon enquiry from the Court Officer at Magistrate’s Court Registry, I was advised that I cannot appeal.
 6. That I am not much educated and had no legal knowledge of the Appeal limitations. I am facing financial difficulties and cannot engage a Solicitor and this however is a civil matter where the Legal Aid Commission would not assist me.
 7. That after taking advice from a few friends I was advised about the Appeal process and sought help to have my documents prepared.
 8. That I also wish to Exhibit a copy of the proposed Notice of Appeal and Grounds of Appeal marked as “SA2”.
 9. That I am being prejudiced in this matter because I had not being heard and my evidence was not taken in.
 10. That I am out of time for approximately 5 months and I humbly submit that the delay was not unreasonable and having the Order Quashed on Appeal will give justification.

11. That I have strong and arguable Ground of Appeal and it will be a grave injustice to me if it is not heard in Court.
 12. That I pray for Order in Terms of Summons and any other Orders the Honourable Court deems just and fit.
3. Ali has also filed a *Proposed Ground of Appeal* and a *Proposed Notice of Appeal*.
 4. The affidavit filed in support of the application did not disclose much. I did order Ali to file and serve a supplementary affidavit which he did on 11 December 2014.
 5. Initially, Asaf Ali ("Asaf") the respondent had filed a claim against Ali in the Small Claims Tribunal. However, as both parties wanted to engage a lawyer, and lawyers being prohibited from appearing as counsel in SCT proceedings, the SCT dismissed the claim to enable the parties to pursue their case in the Magistrates Court with the benefit of counsel.
 6. To cut a long story short, Asaf did file a claim in the Magistrates Court (Civil Case No. 93/2013) claiming the sum of \$6,231.70.
 7. According to Ali, the matter was called at Sigatoka Magistrates Court and every time he appeared, a certain date would be given for the next occasion. Later, he said he faced some family commitments so he did not go. At paragraphs 8 to 9 of his supplementary affidavit, the intended appellant deposes:
 8. THAT I had some family issues and had no money to pay to the Original Plaintiff/Respondent as per the Court Order dated 18th February 2014. I had verbally asked the Original Plaintiff for some time to pay the Cost, although I was not given a chance to fairly defend my case.
 - THAT on the 30th day of July 2014 an Order of Commitment was made against me I was taken into custody by the Sigatoka Magistrate's Court. The next day upon a payment of a \$1000-00 I was granted bail and further ordered to pay \$150-00 per month. The Sigatoka Magistrate Court is still proceeding although I had filed my application to appeal. Annexed hereto and marked "SA 3" is a copy of the Order of Commitment.
 8. In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially.
 9. 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 a judicial 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.

10. After considering the following, I have decided not to grant leave:

- (i) the decision of the Learned Magistrate was handed down on 18 February 2014. Ali filed his motion on 12 August 2014, six months later.
- (ii) his reason for delay is his ignorance of the procedures for appeal.
- (iii) Ali had at some point asked the other party, for some time to settle the disputed amount, which to me indicates that he admits to the judgment sum, which, in turn means that his prospect of success if the matter were to go on appeal is nil.
- (iv) the respondent has not been served and has not participated in this application but that is neither here nor there if the intended appellant's prospect of success is almost nil.

11. Application dismissed.



A handwritten signature in black ink, consisting of stylized initials and a long horizontal stroke.

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Anare Tuilevuka
JUDGE
17 February 2015.