

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No: HBA 2 of 2015
(Magistrates Court Civil Action No. 308 of 2009)

BETWEEN : **Sairusi Doge and Tavaita Doge**
Appellants

AND : **Suva City Council**
Respondent

BEFORE : The Hon. Mr Justice D. C. Alfred

Counsel : Ms N Raikaci for the Appellants
Mr N. Lajendra for the Respondent

Date of Hearing : 21 August 2015
Date of Judgment : 11 December 2015

JUDGMENT

1. This is a Summons for leave to appeal out of time (the Summons) against the Judgment of the Resident Magistrate, Suva, on 14 November 2014, whereby the Defendants (the present Appellants) were ordered to pay the Plaintiff (the present Respondent) the sum of \$21,164.25, interest thereon and costs. The Defendants were given 30 days to appeal the judgment.
2. The Notice and Grounds of Appeal are dated 15 December 2014. That the 15 December 2014 was not the date of its filing was made clear in para 10 of the Affidavit in Support of the Summons, where the deponent, Catherine Raivaroro

(Ms Raivaroro) states the Appellants' Grounds of Appeal "was filed 2 days out of time". It is from this that the Summons arises.

3. When the matter came up for hearing, both Counsel made their oral submissions before me.
4. Counsel for the Appellants submitted 14 December 2014 was a Sunday, so the Appeal could be filed on 15 December 2014. But it was not filed on that (later) date because the Grounds of Appeal needed vetting by the Magistrate. Counsel agreed it was still out of time and therefore applied for extension of time under Order XXXVII rule 4 of the Magistrates' Courts Rules (the Rules) for the Grounds of Appeal filed on 17 December 2014. She had not filed an application for extension to the Magistrates Court. She concluded by saying there was no prejudice to the Respondent.
5. The Respondent's Counsel submitted that Ms. Raivaroro had no written authorization to affirm the Affidavit and questioned the basis on which she was deposing. The Affidavit was defective as she should not be affirming an affidavit in a contentious matter. Counsel said there was no practice of the Magistrate vetting the Grounds of Appeal. As the Affidavit did not have the endorsement, it could not be used in court unless the Court gives leave and no such leave had been sought. The Grounds of Appeal must be served within one month but were only served on 29 January 2015 which was out of time. In any event they do not disclose any merits in the appeal. He therefore asked that the summons be dismissed with costs.
6. The Appellants' Counsel in her reply applied for leave now and said at the leave stage, the Court is not required to look at the substantial merits of the Appeal.
7. At the conclusion of the hearing, I adjourned my decision to a date to be announced. I now deliver my judgment. There are only 2 matters for my decision


and they are (1) whether the Affidavit can be accepted by the Court and (2) whether an extension of time should be granted.

8. I will deal with (1) first. It is trite that a lawyer's clerk may not affirm an affidavit intended to be used in a contentious matter in court. This is indeed a contentious matter where the Respondent is strongly resisting the application for extension of time. This is certainly then an affidavit that should have been affirmed by the solicitor having personal knowledge of the pertinent matters.
9. Further in my view, it is implausible that any grounds of appeal have to be vetted by the trial magistrate first before it can be filed.
10. I am therefore constrained to reject the Affidavit and also to say that in the absence of any valid Affidavit there are no reasons before me for why the grounds of appeal were not filed within time.
11. I turn now to (2). Order XXXVII of the Rules lays down the process flow for Civil Appeals. Rule 4 states that if the grounds of appeal are not filed within the prescribed time, the Appellant is deemed to have abandoned the Appeal unless the Court below or the Appellate Court shall see fit to extend the time. The usual thing then would have been to apply to the Magistrates Court for an extension of time which the Magistrate is empowered to grant under the rule. No reason was given by the Appellants' Counsel for their failure to do so.
12. Be that as it may, the application for extension of time is before me. To enable me to resolve the issue, I will turn now to the decision of the Chief Justice, Gates President as he then was, in *Eddie McCaig v Abhi Manu* (Supreme Court Fiji Civil Appeal CBV0002.12). Gates P said the explanation for the delay of a mere 2 days regrettably lacked candour. "*Counsel should have deposed in an affidavit freely admitting his or her mistake. The explanation here remains unsatisfactory.*"

13. In my opinion the situation in this summons is similar to that in the above appeal. In these circumstances I shall follow the decision above.
14. Consequently, I am unable to grant the extension of time applied for. I therefore dismiss the summons for leave to appeal out of time with costs which I summarily assess at \$1,500 and which is to be paid by the Appellants to the Respondent.

Dated at Suva this 11th day of December 2015.




David Alfred
Judge of the High Court
Suva