

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBA Civil Appeal No. 14 of 2015

BETWEEN : **JAI SHREE LAL** of Navuso, Nausori, Fiji, Carpenter
1ST APPLICANT

AND : **ARVIN LAL** of Navuso Nausori, Fiji, Taxi Driver
2ND APPLICANT

AND : **SURUJ LAL** of Navuso Nausori, Fiji, Taxi Driver
3RD APPLICANT

AND : **PHUL MATI** of Koronivia, Nausori, Fiji, Domestic
Duties
RESPONDENT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : Mr S. Nandan for the Applicants
: Mr S. Kumar for the Respondent

DATE OF JUDGMENT : 18 March 2016

JUDGMENT

1.0 Introduction

- 1.1 On 24 April 2015, Applicant filed Notice of Originating Motion seeking leave to file appeal against the decision of Learned Magistrate delivered on 28 November 2014, in Magistrates Court Civil Action No. 113 of 2010.
- 1.2 On 12 May 2015, being returnable date of the Motion Applicant sought leave to amend the Motion which Leave was granted and the matter was adjourned to 3 July 2015.
- 1.3 On 13 May 2015, Applicant filed Amended Notice of Originating Motion.
- 1.4 On 3 July 2015, Applicant sought to leave to file further amend Notice of Originating Motion which leave was granted and matter was adjourned to 17 July 2015.
- 1.6 On 14 July 2015, Applicant filed 2nd Amended Notice of Originating Motion.
- 1.7 This matter was next called on 7 August 2015, when it was adjourned to 22 October 2015, for hearing.

2.0 Background Facts

- 2.1 On 18 August 2010, Respondent filed Writ of Summons in Nausori Magistrates Court claiming \$11,373.33 from the Applicants as Defendants in Civil Action No. 113 of 2010.
- 2.2 On 25 January 2011, Applicants filed Statement of Defence.
- 2.3 Thereafter, the Magistrates Court Action was listed for hearing on 20 September 2011, when Third Applicant appeared in Court at 11.00am and other two Applicants did not attend and the hearing date was vacated on Applicants application. The Magistrates Court Action was adjourned to 25 November 2011, for hearing.
- 2.4 On 25 November 2011, Applicants Counsel again applied for an adjournment and the hearing date was vacated.
- 2.5 Magistrates Court Action was again listed for hearing on 7 November 2012.
- 2.6 On 7 November 2012, there was no appearance on behalf of the Applicants and as a result the Learned Magistrate entered Judgment by Default against the Applicants.

- 2.7 On 7 May 2013, Applicants filed application in Magistrates Court to set aside Judgment entered in default which application was dismissed by the Learned Magistrate pursuant to Ruling delivered on 28 November 2014.
- 2.8 The Applicants intend to appeal that decision.
- 2.9 It is noted the Magistrate Court Civil Action stated in the Learned Magistrate decision is 15 of 2011 when it should be 113 of 2010. This appears to be typographical error.

3.0 Application to Extend Time to File Notice of Intention to Appeal and Grounds of Appeal

Application to Extend Time to File Notice of Intention to Appeal

- 3.1 Counsel for the Respondent submitted that this Court or the Magistrates Court does not have jurisdiction/discretion to extend time to file Notice of Intention of Intention to Appeal once the prescribed time of seven (7) days (Order 37 Rule 1 of Magistrates Court Rules) has expired.
- 3.2 Respondent relied on **Crest Chicken Limited v. Central Enterprises Limited & Anor.** (2003) High Court Civil Appeal No. 20 of 2003 (19 April 2005) and **Shiu Narayan v. Kumar** (2014) High Court Civil Appeal No. HBA 34 of 2011.
- 3.3 This Court in **Katafono v. Brown** (2016) Civil Action No. HBC 135 of 2014 (14 January 2016) analysed the cases dealing with this issue and held as follows:-

“This Court and Magistrates Court has jurisdiction/discretion to extend time for filing of notice of intention to appeal under Order 3 Rule 9 of the Magistrates Court Rules even if Application to enlarge time is made after prescribed time has expired.” (paragraph 3.20(ii) page 8)

Whether time to file Notice of Intention to Appeal and Grounds of Appeal should be extended

- 3.4 The factors that need to be taken into consideration in exercise of discretion in respect to Application to extend time to file Appeal is well settled and they are:-
- (i) Length of delay.
 - (ii) Reason for delay.
 - (iii) Merits of the Appeal.
 - (iv) Prejudice to the Respondent

CM Van Stilleveldto B V v. E L Carriene Inc. [1983] 1 ALL ER 699 of 704;
Norwich and Peterborough Building Society v. Steed [1992] 2 ALL ER 830
at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051
of 1994S – FCA; **Nand v. Famous Pacific Shopping (NZ) Limited (2010)** FJHC
619; Civil Appeal No. 6 of 2009.

Length of Delay

- 3.5 Decision in respect to Applicant’s Application to set aside Default Judgment was delivered on 28 November 2014.
- 3.6 Notice of Intention to Appeal was to be filed by 5 December 2014, and grounds of appeal was to be filed within thirty days of the decision which of course was not done at all.
- 3.7 The Application to extend time to file appeal was filed on 24 April 2015. It must be noted in the Original Application, Applicants did not seek Order to extend time to file Notice of Intention to Appeal until the Amended Application was filed on 13 May 2015.
- 3.8 It is obvious that delay is inordinate.

Reasons for Delay

- 3.9 In **Kamlesh Kumar v. State** Criminal Appeal No. CAV0001/09 and **Mesake Sinu v. State** Civil Appeal No. CAV001/10 his Lordship the Honorable Chief Justice Gates, President of the Supreme Court of Fiji stated as follows:-

“[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14th November 2003 at p.5.”

- 3.10 His Lordship also quoted the following with approval from Rhodes Cr App. R 35 at 36:-

“A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons.”

3.11 In this instant, Applicants reasons for delay in short is stated as follows:-

- (i) Applicants are lay people and not aware of court procedures;
- (ii) After the decision, Applicants were advised by their Counsel that decision had to be appealed;
- (iii) Third Applicant consulted other Applicants, who all agreed to appeal but they did not communicate that to Mr Nandan within time limit.
- (iv) Third Applicant was informed by Applicants Counsel that:-
 - (a) He attempted to file Notice of Intention to Appeal on 5 December 2014 (last day), but was returned due to typing error;
 - (b) Applicants Counsel was informed by his Clerk on 5 December 2014, that Notice of Intention to Appeal would be accepted by Court Registry on Monday but it was not accepted;
 - (c) Applicants Counsel left for his annual leave and returned in early January 2015 and did not remember about this matter;
- (v) Third Applicant assumed that he instructed Solicitors to file appeal;
- (vi) Third Applicant instructed his Solicitors only after enforcement proceedings commenced.

3.12 Applicants were always legally represented, hence the reason that they were not aware of court procedures is not an excuse.

This excuse also appears to be misleading due to the fact that the Third Applicant in his Affidavit states that he discussed the decision with Applicants Counsel and was informed that decision had to be appealed.

3.13 As to filing of Notice of Intention to Appeal Applicants Counsel was fully aware that pursuant to Magistrates Court Rules Notice of Intention to Appeal **must** be filed after seven (7) days of the decision and Court Registry or Court staff does not have power to extend such time.

3.14 The reason that Applicants Counsel left for annual leave; he did not remember the matter and the Third Applicant **“assumed”** that he has instructed Applicants Counsel to appeal is totally unsatisfactory.

3.15 If Legal Practitioners and parties choose to go on holiday with no regard to legal proceedings and time frame prescribed by Court rules or assume that they complied with Court rules and/or sleep on cases, then they do so at their own peril.

3.16 I, therefore hold that the reason given by the Applicants for not filing the Notice of Intention to Appeal and Grounds of Appeal are totally unsatisfactory.

Merits of the Appeal

3.17 The Applicants submit that the default judgment entered against them was irregular on the ground that the claim was for unliquidated sum which had to be formally proved by the Respondent.

3.18 It is well settled that if default judgment was entered irregularly then it had to be set aside as of right without any conditions.

3.19 It is apparent from the decision of the Learned Magistrate that she took the default judgment to be judgment for liquidated sum and dealt with Application to Set Aside Default Judgment as it was a regular judgment.

3.20 The test, as to whether claim is liquidated or unliquidated is also well settled.

3.21 In **Subodh Kumar Mishra v. Car Rentals (Pacific) Ltd** 31 FLR 49 the Fiji Court of Appeal stated as follows:-

“Before turning to consider the question as to whether or not the judgment was regularly obtained, we must, in the circumstances of this case, go into the question as to what is meant by such phrases as “liquidated demand” and “unliquidated claim”.

In *Knight v. Abbott* (1882) 10 Q.B. 11 it was held that:

“A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under a contract. Its amount must be ascertained or ascertainable as mere matter of arithmetic.”

And to like effect is a dictum in *Workman Clark & Co. Limited v. Lloyd Brazileno* (1908 1 K.B. 968 (C.A.):

“A claim is unliquidated, where even though specified or named as a definite figure, its ascertainment requires investigation beyond mere calculation.”

3.22 I called for the Statement of Claim filed in Magistrates Court and record of Court proceedings of 7 November 2012, and perused the same.

3.23 Respondent’s claim is for one third share of compensation paid by State.

3.24 The amount claimed by Respondent in Magistrates Court could be easily ascertained and did not require **“investigation beyond mere calculation”**.

3.25 The Magistrates Court proceedings of 7 November 2012, recorded by the Learned Magistrate reads as follows:-

“Mr S. Kumar told court that costs have not been paid.

N/A for Defendants.

Mr Kumar made application for striking out of Defence be struck out Default J be entered.

Order - strike out Statement of Defense.

Application for Default J granted.

Order in Terms.

Wastage to be paid prior any other application.”

3.26 Order 30 Rule 3 of Magistrate Court Rules provides as follows:-

“If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the summons proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.” (emphasis added)

3.27 There appears to be a misconception, that where claim is for liquidated sum the Magistrates Court can strike out the Statement of Defense or Defense to Counterclaim and enter judgment by default against the party who fails to attend court on the hearing date.

3.28 This obviously is not the situation. **Sohan Singh v. Fiji Sugar Corporation** [2014] FJHC 755; BHA2.2009 (20 October 2014)

3.29 Under Order 30 Rules 3 and 4 of Magistrates Court Rules the party present in Court must **adduce evidence of the claim or counter-claim before judgment can be entered against the defaulting party. This is to be done irrespective of whether claim is liquidated or unliquidated.**

3.30 In this instance, it is clear from the Magistrates Court record that Respondent (Plaintiff) did not adduce any evidence before the Learned Magistrate.

3.31 Therefore, judgment by default entered against the Applicants is in breach of Order 30 Rule 3 of the Magistrates Court Rules and as such would be irregular and should have been set aside as of right.

- 3.32 However, before I come to a final conclusion of this issue I think it is fair that the Respondent should be given a chance to address the Court on this matter.
- 3.33 For sole reason that judgment by default entered on 7 November 2012, by the Learned Magistrate appears to be irregular I will grant Applicants leave to file Notice of Intention to Appeal and Grounds of Appeal out of time.

Costs

- 3.34 As for costs, I take into consideration that the parties made oral submissions and Respondent to avoid wasting time did not file Affidavit in Opposition but made oral submission only. Since it is Applicants who had failed to take action within prescribed time, it is only appropriate that they pay costs of the Application.

4.0 Orders

4.1 I make following Orders:-

- (i) Applicant is granted leave to file and serve Notice of Intention to Appeal and Grounds of Appeal within seven (7) days from date of this Ruling in respect to Learned Magistrates decision delivered on 28 November 2014, in Nausori Magistrates Court Civil Action No. 113 of 2010;
- (ii) Applicants do pay Respondent's costs of this action assessed in the sum of \$1,000.00.



K. Kumar
JUDGE

At Suva

18 March 2016

Reddy & Nandan Lawyers for the Applicants
S. Kumar, Esquire for the Respondent