

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA, FIJI ISLANDS

CIVIL CASE NO.: HBA 4 OF 2010L

B E T W E E N : VENAIGAM PILLAY of Vakabuli Indian School
Compound, Lautoka.

APPELLANT[ORIGINAL 1ST DEFENDANT]

A N D : GEORGE KAMLES PRASAD

RESPONDEDNT [ORIGINAL PLAINTIFF]

Appearances:

Mr Kumar with Mr S. Krishna for the Appellant
Mr S. Nacolawa for the Respondent

JUDGMENT

1.0 **Introduction and Factual Background**

1.1 This is an application by way of Notice of Motion dated 27 January, 2015 seeking to reinstate to the cause list the appeal of the Appellant which was struck out by the Court on 23rd January 2015. The application is supported by an affidavit sworn by Mr. Ashneel Sudhakar, Legal Practitioner sworn on 27th January, 2015.

1.2 In the said Affidavit Mr. Sudhakar has deposed inter alia the following facts:

- (i) He is a Barrister & Solicitor in the firm of Krishna & Company.
- (ii) The matter involves an appeal from the decision of the Magistrate Court dated 09th April, 2009 and the appeal was filed to this Court by the appellant in May 2010. The Appeal was struck out by an interlocutory ex-tempore judgment due to the Appellant's non - appearance.

- (ii) On or about 17th June, 2011 an application was lodged in this Court to set aside the judgment striking out the appeal for non - appearance.
- (iv) However this Court did not accept the application and the matters was referred to the Fiji Court of Appeal. The Court of Appeal ruled that the application should be filed in the High Court and referred the matter back to this Court.
- (v) Thereafter the appellant filed fresh summons to set aside the ex-tempore judgment on 3rd July 2012 in this Court which was pending for hearing in this Court.
- (vi) On 18th August, 2014 when the matter was last called to fix a hearing date Counsel appearing on the appellant's behalf due to an inadvertent error noted that the appeal will be heard at 11.00am on 23rd January, 2015.
- (vii) Mr. Sudhakar was instructed to appear in Court on 23rd January, 2015 at 11.00am and conduct the hearing. He attended Court around 11.00am and was advised by the Court clerks that the matter was already called around 9.30am and the appeal was struck out with costs due to the non - appearance of the appellant or Counsel. He was under genuine assumption that the matter will be heard at 11.00am and not 9.30am.
- (viii) He was present in the Court premises from 8.30am but was engaged in the Masters Court and thereafter in Judge Ajmeer's Court attending to various matters and at no time heard this matter being called around 9.30am or else would have attended to it. After he finished his other matters he immediately came to this Court but was told by the clerks that he was late and the appeal was struck out with costs by this Court.
- (ix) He regret that this error occurred and sincerely apologise to this Court for non - appearance which as explained has occurred due to mix up of hearing times. The error was genuine and was unintentional.
- (x) He immediately on the same day wrote to the Respondent's Counsel and advised him of the error and sought his consent to reinstate the matter to the cause list (copy of the letter marked as "AS 2" is annexed)
- (xi) He seeks that the matter be reinstated to the cause list so that the Appellant's appeal could be heard and the costs ordered be vacated

since the non - appearance was unintentional and the Appellant is genuine about prosecuting his appeal. Any prejudice suffered by the Respondent could be cured by costs if he is successful at the conclusion of the appeal since he does not have a cross appeal.

2.0 The Respondent in his affidavit in opposition to this application states inter alia that:

- i) There was no Orders made by the Fiji Court of Appeal to the Appellant to file his application in High Court.
- ii) Hearing was fixed for 23 January, 2015 after much prolonged adjournments and he was present in person on 18th August 2014 and the time given by the Court Clerk was 9.30am. The Appellant and /or his Counsel would have checked the court cause list in the morning on 23rd January, 2015 to be certain about the case time if the cause was listed on the day.
- iii) The Counsel is misleading the Court, the Counsel left the Court premises in his vehicle around 9.15am as the Respondent was sitting on the bench in front of the Court registry and did not return to the Court premises when the matter was called. The Court clerk called for the Appellant three (3) times at the door of the Court and there was no presence of the Appellant and/or his Counsel.
- iv) He was not aware of the annexed letter "AS 2" and it was never brought to the attention of his Counsel although on 23rd January 2015 his Counsel informed him that Mr. Krishna did call him when he was in Suva Fiji Court of Appeal and Mr. Krishna said he would see him on 26th January 2015 but Mr. Krishna was not specific on the reason to see his Counsel.
- v) He strongly objects for the matter to be listed in the cause list as the Appellant and/or his Counsel have intentionally delayed the matter. He will be prejudiced as this case is on-going for far too long (since 2008) due to the negligence of the Appellant.

3.0 Analysis and Determination

3.1 The main application of the Appellant is the application to set aside the Interlocutory Ex Tempore Judgment sealed on 18th January 2012. The said application is made on 12th September 2012.

3.2 It is pertinent to note the finding of Justice Inoke in his Ex – Tempore Judgment which is made due to the non - appearance of the Appellant. In paragraph 5 of the said Judgment Inoke J said as follows:

“[5] The Appellant has not appeared on the last several occasions without any explanation. I do not think he is serious about his appeal. He has failed to prosecute it with reasonable diligence. I therefore strike out the appeal for the Appellants non - appearance and for the failure to prosecute his appeal with reasonable diligence.”

3.3 It is seen from the said Ex Tempore Judgment that Inoke J has gone through the history of the matter and found that the Appellant has failed to prosecute his appeal with reasonable diligence.

3.4 However I find that up to the date of pronouncing the afore mentioned Ex Tempore Judgment the Appellant was self-represented; and later Appellant has been represented by Solicitor Krishna and Company. Accordingly the Summons to set aside the Ex Tempore Judgment is filed by Messrs Krishna and Company Barristers and Solicitors.

3.5 As such it is my view that the past delay on the part of the Appellant is not an issue to be considered in the present application. It is the Appellant’s Counsel who submits that due to an inadvertent error of noting a wrong time he could not come to Court at 9.30am on the hearing date. Therefore I will confine myself to analyse the affidavit evidence to see whether the Learned Counsels version is acceptable or not in arriving at a decision. The delay on the part of the Appellant could be considered by the Court in the other application made by the Appellant to set aside to ex-tempore judgment.

3.6 Therefore I will now consider the affidavit evidence placed before me by the Appellant’s Counsel and the Respondent to determine whether this application is merited or not.

3.7 The Learned Counsel deposes in his affidavit that the Counsel appearing on the Appellant’s behalf due to an inadvertent error noted that the appeal will be heard at 11.00am on 23rd January 2015. He states further that he attended Court around 11.00am and was advised by the Court clerk that the matter was already called around 9.30am and the appeal was struck out with costs due to non – appearance of the Appellant or Counsel. He also states in his affidavit that he was present in Court premises from 8.30am and he was under genuine assumption that the matter will be heard at 11.00am and not 9.30am and they had even advised the Appellant in August 2014 that the matter is fixed for hearing on 23rd January 2015 at 11.00am.

- 3.8 The Respondent also states in his affidavit that he saw the Appellants Counsel leaving the Court premises in his vehicle around 9.15am.
- 3.9 In analysing the affidavit evidence before me I find that Mr. Sudhakar Counsel for the Appellant has left the Court premises around 9.15am and had come back to this Court around 11.00am. It is at difficult for me to believe that the Learned Counsel left the Court premises around 9.15am knowing that the matter is for hearing at 9.30am. If he had any difficulty in coming at 9.30am he would have informed the court clerks or the Appellant's Counsel of his inability to attend Court at 9.30am for the hearing. From the evidence as analysed herein before I am of the view that the non – appearance of the Learned Counsel was unintentional and it was due to an inadvertent error of the Solicitor who has noted the time of hearing as 11.00am when the matter was called on 18th August 2014.
- 3.10 Due to the reasons given as above I do not find that the Appellant's Counsel has acted negligently in not coming to Court at 9.30am on the hearing date. I hold that his absence at 9.30am on 23rd January, 2015 was unintentional due to an inadvertent error of noting the wrong time on the previous mention date of the matter. However, I will not vacate the cost order made against the Appellant on 23rd January 2015 as the Respondent is prejudiced by further delay of this matter; but the cost order is varied to be cost in the Appeal.

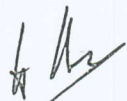
4.0 Conclusion

Due to the foregoing reasons I make the following Orders:

- a) The appeal stuck out on 23rd January, 2015 is reinstated and restored to the cause list.
- b) Cost ordered against the Appellant on 23rd January 2015 will be cost in the appeal.
- c) No costs in regard to this application.



At Lautoka
19 April, 2016


Lal S. Abeygunaratne
[Judge]