

IN THE HIGH COURT OF FIJI AT SUVA
APPEAL/CIVIL JURISDICTION

High Court Civil Appeal No. HBA 12 of 2016

Nausori SCT Appeal No. 103 of 2015

Miscellaneous 03 of 2015.

BETWEEN

AJEN PRASAD JASWAL of Samron Farm Road, Waila, Sawani.

APPELLANT

AND

BISUN PRASAD of Los Angeles (USA) father of Yogesh Prasad of
Corbbet Avenue, Waila, Nausori.

RESPONDENT

Counsel : Appellant appears in person
Mr. Singh K. for Respondent

Date of Hearing : 11th October, 2016

Date of Judgment : 24th October, 2016

JUDGMENT

- [1] This is an appeal from the ruling of the learned Magistrate of Nausori on an application for leave to appeal out of time from the award of the Small Claims Tribunal dated 16th April, 2015.
- [2] In terms of section 33(3) of the Small Claims Tribunal Decree 1991 an appeal shall be brought by a party by the filing of a notice of appeal in Form 6 of the First Schedule to this Decree, together with the fee prescribed in the Second Schedule in the High Court or any Magistrates' Court (as the case may be) within 14 days of the Tribunal's order.
- [3] The appellant filed the application for leave to appeal out of time on 09th June, 2016, more than five weeks after the expiry of the period within which the appeal was required to be filed.
- [4] The learned Magistrate refused the application for leave to appeal out of time on the following grounds;
- (a) The appellant has failed to explain the delay in preferring the appeal.
 - (b) The grounds of appeal contained new matters that were not adduced before the tribunal.
 - (c) The appellant had admitted the claim and raised no dispute before the tribunal.
 - (d) No dispute was raised regarding the quotations called for by the tribunal.
- [5] In arriving at her findings the learned Magistrate has been guided by the principles laid down in the decision in the case of **Kumar v Singh** [2015] FJHC 110; HBA06.2014 (24 February 2015) where it was held as follows;

In determining an application for an enlargement of time the court has a discretion which must be exercised judicially. Gates CJ in **McCaig v Manu** (unreported CBV 2 of 2012 delivered on 27 August 2012) sets out the following factors to ensure a principled approach to the exercise of the discretion:

- (a) length of delay;
- (b) reason for delay;

- (c) whether there is a ground of merit justifying the appeal court's 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.
- [6] The delay may not be that long but the appellant must offer an explanation as to why he could not prefer the appeal within the period prescribed by law. The appellant even at the hearing of the appeal did not give any reason for not preferring the appeal in time.
- [7] The appellant also alleged that the learned Resident Magistrate erred in law by not taking into consideration that within 42 days the appellant via motion applied for leave to appeal the decision of the of the Small Claims Tribunal. Filing an application within 42 days does not help a person who failed to appeal within the time prescribed by law and failed to explain his delay in preferring the appeal.
- [8] The appellant avers that the learned Resident Magistrate failed to evaluate or consider that the appellant's application to appeal out of time is on merits and serious fraudulent questions are to be tried since the appellant did not cause the accident and it was due to an unforeseen mechanical failure and that the other vehicle which was involved in the accident was speeding.
- [9] These are matters that should have been taken at the hearing before the Small Claims Tribunal and not in appeal before the learned Magistrate. Under section 33(1) of the Small Claims Tribunal Decree 1991 the Magistrate sitting in appeal from an award of a referee of the Tribunal has very limited power.
- [10] Section 33(1) of the Small Claims Tribunal Decree 1991 provides as follows;
- Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal under section 15(6) or section 31(2) on the grounds that:
- (a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or
 - (b) the Tribunal exceeded its jurisdiction.

- [11] There is no allegation that the Referee's conduct at the hearing was prejudicial to the rights of the appellant nor does he say that the Tribunal exceeded its jurisdiction.
- [12] The learned Magistrate is therefore correct in holding that the court cannot consider the matters of fact taken up for the first time in appeal as grounds of appeal sufficient for the court to grant leave to appeal out of time.
- [13] The appellant faulted the learned Magistrate for not taking into consideration the fact that the appellant is seeking justice against the respondent through the court to appeal out of time to achieve justice.
- [14] I must say that any quasi judicial tribunal or a court of law can administer justice within the frame work of the law. They cannot ignore the specific provisions of the law and make orders as they wish.
- [15] *Vigilantibus Et Non Dormientibus Jura Subveniunt* (the law assists those that are vigilant with their rights, and not those that sleep thereupon). The appellant without following the proper steps required by law cannot later blame the learned Magistrate for his own faults.
- [16] For the reasons aforementioned I see no merit in the appeal of the appellant and the appeal is accordingly liable to be dismissed with costs.

ORDERS

1. The appeal of the appellant is dismissed.
2. The appellant shall pay the respondent \$500.00 as costs (summarily assessed) of the appeal.


Lyone Seneviratne

JUDGE



24th October, 2016