

IN THE HIGH COURT OF FIJI AT SUVA

APPEALATE JURISDICTION

Case No: HBA 22 OF 2016

BETWEEN : **UNISAN COMPANY LIMITED** a limited liability company of Suva

APPELLANT

AND : **VIRS CONSTRUCTION COMPANY LIMITED** a limited liability
Company of Suva

RESPONDENT

BEFORE: **His Lordship Hon. Justice Fredrick Indran X.A. Nicholas**

COUNSEL: Ms. Ulamila Fa for the Appellant

Mr. Nilesh Lajendra for the Respondent

DATE OF RULING: **28th April 2017**

RULING

(Preliminary Issue)

MATRIX

1. This is an appeal before this Court against the decision of the Magistrates Court at Nasinu made on 28th day of September, 2016.
2. On 30th November 2016 being the 2nd mention date of the appeal, the learned Counsel for the Respondent raised a preliminary objection to the effect that this was a defective appeal; in that Order 37 rule 1 of the Magistrates Court Rules has not been complied with by the Appellant; and no application has been filed to enlarge or abridge the time for the filing and service of the same. Neither the Appellant nor the Counsel was present.
3. On 28th February 2017, the 4th mention date and in the presence of both learned Counsel for the parties it was directed by the Court that parties were to file written submissions with regard to the matter of the preliminary objection, which was set down for hearing on 27th April 2017.
4. The matter was then heard on the said date as scheduled; with a ruling to be delivered on notice.

PRELIMINARY ISSUE

5. The issue before this Court is whether this Court has the discretion to proceed with the hearing of this appeal when the 'Notice of Intention to Appeal' ('the

said 'Notice') was ostensibly filed and served out of the time prescribed by the Rules of the Magistrates Court ('the said Rules'); and no application has been filed to enlarge or abridge the time for the filing and service of the same.

RESPONDENT'S SUBMISSION

6. Mr. Lajendra, learned Counsel for the Respondent brought the Court's attention to Order 37 rule 1 of the said Rules; which provides that an Appellant has to give notice of his intention to appeal within 7 days of the date of the impugned judgement, both to the Respondent and to the Court appealed from.
7. The said Notice must be in writing within that stipulated period; or provided verbally to the Court in the presence of the opposing party immediately after the judgement is pronounced.
8. Learned Counsel for the Respondent averred that this was not done in this case where the judgement was entered on the 28th of September 2016; and notwithstanding that the said Notice was first filed on 5th October 2016 (on the 7th day after judgement) and subsequently (for reasons that will be mentioned later) on 13th October 2016; the said Notice was only served on the Respondent's Solicitors on 17th October 2016, which was some 12 days after the said judgement; and thus well outside the time frame provided by the said rule.
9. Learned Counsel took the view that the said Rules do not provide this Court with the discretion to enlarge the time to comply with the rule concerned; and cited the following cases in support of his contention:

- a) **CREST CHICKEN LIMITED v CENTRAL ENTERPRISES LIMITED & DETECTIVE CORPORAL ATALIFO WISE**, Civil Appeal No. 13 of 2003 (High Court of Fiji at Suva); and
- b) **AUTOWORLD TRADING (FIJI) LIMITED v ESALA MAU RAIDRUTA trading as KULA MATAGI**, Civil Appeal No. HB 04 of 2017 [2017] FJHC 251.

10. Over and above that, learned Counsel for the Respondent stated that the appeal before this Court was also defective as, notwithstanding his view stated above, there was no application filed by the Appellant for an extension of time to file and serve the said Notice; either before this Court or in the court below.

11. On that basis learned Counsel for the Respondent prayed that this appeal, such as it was, be struck out.

APPELLANT'S SUBMISSION

12. Ms. Fa, learned Counsel for the Appellant was, needless to say, of a contrary view. Counsel averred that this Court has the power to extend the time to file the 'Notice of Intention to Appeal', and cited the following cases in support of her assertion:

- a) **RESINA NAFRUE MERUTU KATAFONO v KENNETH RICHARD BROWN**, HBC 135 OF 2014;
- b) **ISIKEL MARAVU TUITUKU & Anor. V ISIKELI TUITUKU & Ors.**, Family Court Appeal No. 1 of 2014 (7th December, 2014) (Wati J.);

- c) **JAN'S RENTAL (FIJI) LIMITED v NANDS**, Civil High Court no. HBL 147/14 (27th January 2014); and

- d) **FIJI POSTS AND TELECOMMUNICATIONS LTD. V SUEY LOO KEEN**, HBA 003 OF 2000 (21st March 2014) (Wati J.).

- 13. Moreover, learned Counsel referred to section 39 of the Magistrates Court Act which provides discretionary powers to this Court to decide on the matter at hand.

- 14. Whilst, Counsel also stated that Order 3 rule 9 of the Magistrates Court Rules gives this Court the power to enlarge or abridge the time appointed by the said Rules.

- 15. Further to this, Learned Counsel for the Appellant stated that the 'Notice of Intention to Appeal' ('the said Notice') was lodged for filing with the Court Registry at Nasinu on 5th October 2016, as evidenced by the date stamp found on the said document ~ but which was returned by the Registry with instructions purportedly from the learned Magistrate to file the same together with the 'Grounds of Appeal'. This was done by the Appellant's Solicitors on 13th October 2016; which was extracted on 14th October 2016 and served on the Respondent's Solicitors on 17th October 2016.

- 16. Such being the case, learned Counsel argued that there was in fact no delay in the filing of the said Notice; and that pursuant to the learned Magistrate's aforesaid purported instructions the situation fell within the ambit of Order 37 rule 4, which allows the court to extend time, *i.e.* that it could be deemed as an extension of time as 'sanctioned by the lower court'.

17. No explanation was proffered with regard to the delay of serving the said Notice upon the Respondent's Solicitors.

THE GERMANE PROVISION

18. Order 3 rule 9 of the Magistrates Court Rules provides:

Power to enlarge or abridge time

*A court or a judge shall have power to enlarge or abridge the time appointed by the Rules, or fixed by any Order enlarging time, for doing any act or taking any proceedings, such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although **the application** for the same is not made until after the expiration of the time appointed or allowed:*

Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction or order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the court or a judge shall otherwise order.

(emphasis added)

THE FINDING

19. Notwithstanding the sentiments of learned Counsel for the Appellant with regard to the issue of whether or not the said Notice was deemed to have been lodged in the Magistrate Court within the “extension of time as ‘sanctioned by the lower court’”, the same was not served upon the Appellant’s Solicitors until the 17th October 2016, some 4 days after the lodgement with the Magistrates Court on 13th October 2016. Surely if a period of time is prescribed by the Rules to apply to both the filing and service of a document, that period of time, or any purported extension thereto, must also apply to both the filing in Court and to the service thereof on the opposing party. That, it would seem, was not the case here.
20. In short, it would appear that the Appellant has not strictly complied with Order 37 rule 1 as regards the Notice of Intention to Appeal; at least as far as the service upon the Respondent’s Solicitors of the said Notice.
21. Whatever may be the position with regard to the dichotomy of precedents as it stands in the High Court as regards the position of whether or not there resides in the Court the discretion to enlarge time to comply with the said Order; and in that respect this Court make no specific ruling on that point; it remains that no steps have been taken by the Appellant to formalise leave to serve (and perhaps even, file) the said Notice out of time.
22. Order 3 rule 9 of the Magistrates Court Rules provides that an **“application”** for the enlargement of time must be made, and here before this Court, as stated above, there is no such application.

23. Under the circumstances, this Court concurs with learned Counsel for the Respondent in that the appeal herein is defective for want of the required application.

THE FINAL ORDER

24. Such being the case, the preliminary objection is upheld and this appeal is duly struck out; with no order as to costs.



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Fredrick Indran X.A. Nicholas
JUDGE of the High Court of Fiji

At Suva

Handed Down And Dated this 28th day of April, 2017 .



Law Solutions for the Appellant
Lajendra Lawyers for the Respondent