IN THE HIGH COURT OF FIJI

AT SUVA

APPELATE JURISDICTION

Civil Action No.: HBA 01 of 2017
(On an Appeal from the Magistrate Court of Fiji at Suva in Civil Action No. 112 of 2009)

BETWEEN : **FIJIANA BUILDERS & CONSTRUCTION FIJI LIMITED** a limited liability company duly incorporated under the Companies Act, Cap 247 having its registered office at Lot 15, 16 Makoi Industrial, Nasinu.

APPELLATE

AND : **DENARAU INVESTMENTS LIMITED** a limited liability company duly incorporated under the Companies Act Cap 247 having its registered office at Munro Leys, Level 3, Pacific House, Butt Street, PO Box 149, Suva.

FIRST RESPONDENT

AND : **KALI NADAN** of Sanasana, Naisoso, Nadi.

SECOND RESPONDENT

Counsel : **Ms. S. Devan for the Appellant**
Ms. L. Lagilevu for the First Respondent
Mr. T. Sharma for the Second Respondent

Date of Hearing : **6th October, 2017**

Date of Judgment : **20th October, 2017**

JUDGMENT

INTRODUCTION

1. This is an appeal from learned Resident Magistrate's (RM's) decision not to grant an adjournment on the date fixed for trial. The Plaintiff-Appellants (the Plaintiff) had filed a writ of summons seeking damages for breach of contract on 15th May, 2009 and the Statement of Defence was filed on 20th August, 2009. The matter was first fixed for trial on 17th August, 2010. This hearing did not take place due to parties not prepared for

hearing and finally it was fixed for hearing nearly 7 years from the first date of hearing on 1st August, 2016. Again an oral adjournment of the hearing was sought by the Plaintiff, which was unopposed by the Defendant. The RM had refused the adjournment on the basis that such an adjournment cannot be compensated by an award of costs to the opposing parties. The Plaintiff did not lead any evidence and RM delivered a ruling on 3/1/2016 striking out and dismissing the action. This is an appeal against said ruling of RM.

2. The Plaintiff being aggrieved had sought to quash the ruling of RM and Grounds of Appeal are stated as follows;

> *'1. The learned Resident Magistrate erred and or misdirected himself in law and in fact in refusing to vacate and grant an adjournment of the trial date when;*
>
> *(i) The Counsel in carriage of the within action for the Plaintiff had resigned from the law firm of Messrs. Neel Shivam Lawyers on the 28 of July 2016.*
>
> *(ii) In the circumstances, the Plaintiff and /or its new Counsel did not have sufficient time to apprise themselves of the proceedings and prepare for the trial set down before the Magistrate Court for 1st August, 2016.*
>
> *(iii) The Defence Counsel consented to the hearing being vacated and adjourned to another suitable date.*
>
> *2. The Learned Resident Magistrate erred and or misdirected himself in law and in fact in failing to apply the principles governing the discretion of the Court on whether to grant or refuse an adjournment.*
>
> *3. The Learned Resident Magistrate's decision tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.'*

3. At the hearing counsel for the Respondent–Defendant (the Defendant) made a preliminary objection that the Plaintiff had not given Notice of Intension to Appeal in terms of Order XXXVII Rule 1 of Magistrates' Court Rules.

4. Order XXXVII rule 1 of Magistrates' Court Rules states as follows

> ***Notice of Intension to Appeal***
>
> *'1. Every appellant shall within seven days after the day on which the decision appealed against was given, **give to the respondent and to the***

> ***court*** *by which such decision was given (……)* ***notice in writing*** *of his intension to appeal.*
>
> *Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.' (emphasis added)*

5. So what is paramount consideration under said provision is that not only the court but also the party against whom the appeal is lodged should be given Notice of Intention of Appeal.

6. This notice can be made verbally or in writing. If a party wishes to give oral notice to appeal it should be done immediately after judgment is pronounced and this has to be in the presence of the opposing party.

7. So, the emphasis on the importance of presence of the opposing parties when notice is given verbally indicate that notice to the opposing parties are equally important.

8. The counsel for the Plaintiff stated that they had lodged Notice of Intention to Appeal on the very next day in the Registry and that is evidenced from the stamp to the effect that it was 'Received' by the Registry on 4th August, 2016.

9. This is only part fulfillment of the requirement under the law, as there is no evidence of giving notice to the opposing parties.

10. I cannot find any evidence of notice of intension given to the Defendant and, or Third Party. So even if one were to accept the position that the Plaintiff had lodged an appeal in the registry it cannot be considered as compliance of the said provision contained in the Order XXXVII rule 1 of Magistrates' Court Rules.

11. The Plaintiff had also filed a summons in this appeal seeking extension of time to file Notice of Intension to Appeal. This is obviously a wrong procedure and was done before the matter was allocated to me.

12. No fresh evidence can be adduced in an appeal unless leave is sought separately for that purpose. No such leave was sought hence all the affidavits filed without leave of the court in this appeal should be disregarded and or struck off for the purpose of the determination of this appeal.

13. Order II rule 2 of the Magistrates' Court Rules deals with enlargement of time and states as follows

> *'2. Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice , in any suit. Where such consent cannot be obtained, either party may apply to the court for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until the expiration of the time allowed or appointed.'*

14. The above rule is applicable for '*any suit*' and first recourse is to obtain the consensus of the parties for enlargement of time, but if that is not possible an order of the court can be obtained. The word *'court'* means court below, in terms of the definition given under the said Rules. So, this rule cannot be applied to an Appeal.

15. A party who seeks an extension of time '*appointed by these Rules*' can make such an application Order III Rule 9 of the Magistrates' Court Rules, either to the court below or to a judge and it states as follows

> *'A court or a judge shall have power to* ***enlarge*** *or abridge the time* ***appointed by these Rules****, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon 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 dong any act is or has been fixed or limited by any of these Rules or by any direction or order or 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 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)

16. The Notice of Intension to Appeal is a requirement under Order XXXVII rule 1 of Magistrates' Court Rules. In ***One Hundred Sands Ltd v TeArawa Ltd*** [2015] FJHC 487; HBC112.2014 (30 June 2015) Alfred J in the High Court, had quoted following passage from ***Ratnam vs. Cumarasamy and Another*** [1964] 3 All E.R. at page 935; (Lord Guest in giving the opinion of the Board to the Head of Malaysia)

> *"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken,* ***there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.*** *The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle."* (emphasis is mine)

17. Order III rule 9 of the Magistrates Court Rule grants the court below as well as to a judge power to enlarge or abridge the time appointed by '*these Rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any)* ***as the justice of the case may require***. Under said rule an extension is not granted as of right, but in the exercise of discretion of the court. This is an exception to the rule, that compliance to rules are mandatory, and cannot be applied without considering merits of the Appeal. So not only the delay and explanation for delay but also merits of the case should be more than an arguable case.

18. Even if one assumes that Plaintiff had lodged the Notice of Intention to Appeal on 4th August, 2016 it can only be considered as giving notice to the Court, and no more. This lodgment cannot be considered as giving notice to the opposing parties within 7 days of judgment. It is not clear when the Notice of Intension of Appeal given to the opposing parties. But by making an application seeking extension of time in this appeal it is presumed

that Notice of Intension of Appeal was not given within the stipulated time, to the opposing parties.

19. No such extension was sought before such belated Notice of Intension was given to the opposing parties. The Plaintiff had filed a summons to strike out this appeal, on the basis of non-compliance of Order XXXVII rule 1 of Magistrates' Court Rules, before this matter was allocated to me. I was not pointed out any provision where such summons could be filed in an Appeal in terms of Magistrates' Court Rules or High Court Rules. Such an objection by the Defendant can be raised as preliminary objection at the hearing of the Appeal. Again some affidavit evidence was submitted without prior leave of the court, and this is disregarded too.

20. In an Appeal no fresh evidence can be adduced unless leave of the court is obtained and appeal is a re-hearing on documents, contained in Record of the Magistrate's Court.

21. The Plaintiff sought an extension of time when this appeal was before this court. In my judgment such an application cannot be considered within the Appeal, and should have been sought before such belated Notice of Intension was given to the opposing parties.

22. Without prejudice to what was stated above there is provision contained in the Magistrates' Court Rules to rectify any error or defect by the High Court and this is contained in Order XXXVII rule 18, which states as follows;

> *'18. The appellate court may, from time to time, make any order necessary* ***for determining the real question in controversy*** *in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its finding on any question which the appellate court think fit to determine before final judgment in the appeal and generally, shall have as full jurisdiction over the whole proceedings as it the proceedings had been instituted and prosecuted in the appellate court as a court of first instance , and may rehear the whole case, or may remit it to the court below to be reheard , or to be otherwise dealt with as the appellate court directs.'*

23. In terms of the above provision this court can rectify the delay or defect of not obtaining extension, in order to determine *'real question in controversy'*. If there is a grave error of law or fact that needed rectification in an Appeal the said provision can be utilized in Appeal, without resorting path of least resistance. The technicalities are important, but in my judgment that should not be a determining factor when there is no determination on merits of a matter by court below.

24. In ***Wakaya Vs Chambers et al*** (unreported) (decided on 10th November, 2011) Fiji Supreme Court (Gates CJ) quoted the following passage from ***Emanuel v Australian Securites Commission*** 144 ALR 359 Kirby J

> *'There is a reason for the tendency in the series of cases cited by McHugh JA in Woods v Bate... and in other cases to like effect, for the reluctance of courts in recent times to invalidate acts done pursuant to a statutory condition. Courts today are less patient with merit less technicalities.* ***They recognize the inconvenience that can attent an overly strict requirement for conformity to procedural preconditions. In the morass of modern legislation, it is easy enough, even for skilled and diligent legal practitioners*** *(still more lay persons who must conform to the Law)* ***to slip in complying with statutory requirements.....An undue rigidity in insisting upon strict compliance with all of the procedural requirements of the law could become a mask for injustice and a shield for wrong-doing."*** *(emphasis is mine)*

25. In ***Wakaya Vs Chambers et al*** (supra) the Fiji Supreme Court (unreported) (decided on 10th November, 2011) had allowed an application for special leave. The application seeking leave from the Supreme Court was filed within the time period but was not served to parties within time. His lordship Gates CJ held that in terms of the Supreme Court Rules, the lodgment and service the Application for Leave, was required to be within 42 day time period, but having considered merits, granted the leave to appeal. In that, there was no separate application for extension sought and the delay was raised as preliminary objection.

26. Though I am inclined to uphold the preliminary objection and dismiss the appeal, having considered the circumstances I will not do so.

27. All the three Grounds of Appeal relate to the exercise of discretion by RM not allowing the adjournment. So I do not intend to deal with them separately.

28. In ***Re Yates' Settlement Trusts; Yates and Another v Paterson and Others*** [1954] 1 All ER 619 at 621(Sir Raymond Evershed MR) held,

> *'There is, I think, no doubt that, if a judge adjourns a case, just as if he refuses an adjournment of a case, he has performed a judicial act which can be reviewed by this court, though I need not say that an adjournment, or a refusal of an adjournment, is a matter prima facie entirely within the discretion of the judge. This court would, therefore, be very slow to interfere with any such order, but, in my judgment, there is no doubt of the jurisdiction of this court to entertain appeals in such matters.*

29. The crux of the appeal is the exercise of discretion of RM in not allowing adjournment. This court is slow to review such an exercise of discretion due to obvious reasons. Yet I am mindful that the Plaintiff's action was dismissed, without considering merits of the claim, and despite technical defects the real issue of this appeal is reasonableness of RM's decision.

30. It is accepted that even a weak case needs time of the court and not dismissed or struck off without proceeding to trial, but the court needs to give a reasonable opportunity for the Plaintiff to prosecute the claim. What is reasonable depends on the circumstances of the case and RM is the best person to judge such reasonableness considering the number of cases that he had and the conduct of the parties, including factors such as reasons given for postponement, when and how such an application for adjournment was made, evidence in support of reasons for postponement number of previous adjournments sought, alternatives or remedies for states reason etc.

31. What I could deduce from the record was that this matter was first fixed for hearing in the court below on 17th August, 2010 and it was recorded that parties were not ready for hearing.

32. On 1st August, 2016 Plaintiff's solicitor sought an adjournment. This adjournment was not objected by the opposing parties, but RM had not allowed postponement of the trial exercising his discretion.

33. An adjournment of a trial or hearing can happen only when the court grants it and parties to a matter cannot insist an adjournment as of right. The time of the court should not be unnecessarily wasted by litigants who are not keen to prosecute their claims, as that time can be utilized for determination of number of keen litigants eagerly awaiting hearing of their matter.

34. There was no formal application filed seeking an adjournment before the hearing and an oral application was made for adjournment when it was taken for trial. The reason for adjournment was that the lawyer had resigned from the firm of solicitors. It was stated that said lawyer had conducted the matter.

35. Perusal of the Copy Record would indicate that several lawyers have appeared on behalf of the Plaintiff and was represented by the same firm of solicitors from the start. It is an internal matter how a firm of solicitors manage their affairs. There was no evidence presented to the court below regarding, the date of resignation of the lawyer and or when the request for resignation was made and accepted. These were materials that needed to be stated in court below. RM in his ruling has stated that

> *'In his submission, counsel for the Plaintiff indicated that his firm employed six legal practitioners.* ***However, counsel did not inform the court when did counsel handling this matter left their firm'*** *(emphasis added)*

36. The learned RM had considered facts presented to him specially the need to finality of the alleged claim that had arisen more than a decade ago. Plaintiff cannot be given unlimited time to prepare for his case. The Plaintiff was granted a reasonable opportunity and had failed to utilize it.

37. Normally, cost is granted to mitigate the inconvenience for the opposing parties when an adjournment is sought but this cannot be always remedy. This is specially so when opposing parties do not object for postponement. No award of cost is justified in those circumstances. So RM was correct in not ac cording costs.

38. Considering the facts before RM, I cannot see any error in the exercise of discretion. Discretion should be exercised reasonably and in my judgment the exercise of discretion to refuse adjournment was reasonable. There is no need to interfere with the decision of RM not to grant an adjournment of hearing considering all the circumstances of this case.

39. This Appeal is dismissed and decision of RM for not allowing an adjournment is upheld. The cost of this appeal is summarily assed at $1,500 for each of the opposing parties.

FINAL ORDERS

a. Appeal is dismissed/struck off.

b. The Appellant is also ordered to pay a cost of $1,500 summarily assessed to each of the parties.

Dated at Suva this 20th day of October, 2017

....
Justice Deepthi Amaratunga
<u>High Court, Suva</u>