

seek extension of time from High Court, when an appeal is deemed abandoned in terms of the High Court Rules.

Analysis

[2] Order 59 rule 10 states;

'1. An application to enlarge the time period for fitting and serving a notice of appeal or cross appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter parte summons supported by an affidavit.'

[3] So, where a party had not filed a Notice of Appeal within the time period stipulated in Order 59 rule 9 of the High Court Rules of 1988 may make an application for enlargement of time in terms of Order 59 rule 10(1) of the High Court Rules of 1988.

[4] Once a Notice of Appeal is filed within the time period there is no issue of enlargement of time to file a Notice of Appeal regarding the said decision of the Master.

[5] The Master's decision was delivered on 11th May, 2017, and a Notice of Appeal against the said decision was filed on within the stipulated time. An affidavit of service was also filed in terms of the law and these are admitted in the affidavit in opposition.

[6] High Court Order 59 rule 17 lays down the procedure regarding an appeal from the Master and it sates as follows:

'Order 59 rule 17 (1) The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit or service within 7 days of such service.

(2) The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.

(3) If, this rule is not complied with, the appeal is deemed to have been abandoned.'

- [7] So non-compliance of Order 59 rule 17 is fatal and the appeal is deemed abandoned. This is a legal fiction, when that is applied in the any rule or a statute its effect cannot be diluted by circumventing other means. If so 'deeming provision' becomes meaningless.
- [8] In my judgment when the appeal is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules in terms of the legal fiction that is introduced in the said provision of law, that should be the end of appeal process in the High Court in terms of High Court Rules of 1988. Any other interpretation would make 'deeming provision' contained in Order 59 rule 17(3) redundant and superfluous.
- [9] If, this application for enlargement is allowed what is the effect of Order 59 rule 17(3). It would be made redundant and its utility is nullified. Any party for any reason could easily circumvent the 'deeming provision' by filing a fresh application for enlargement of time. This would create an absurd situation where something which is expressly deemed terminated is meaningless.
- [10] This application for extension of time can be rejected on case management ground as well. The rules of the court and procedural laws are all made for smooth functioning of the court system and also to provide optimum utilization of time and resources of the court for expeditious results. There is a determination by Master. Though it is subject to an appeal when the appeal is deemed abandoned, the same party cannot seek extension of time to file a another 2nd Notice of Appeal. If so there will not be an end to such applications of extension of time to file. This is an encouragement to abuse of process.
- [11] The issue of extension of time to file Notice of Appeal will arise only when there no such Notice of Appeal filed. After compliance of the time period for filing Notice of Appeal there is no opportunity to seek extension if the appeal is deemed abandoned in mid-way in the appeal process. The due process of law needs to be followed. What is expressly stated cannot be allowed to be diluted, when the appeal is deemed abandoned it is abandoned and the error is fatal. There should be finality to a determination and High Court Rules have expressly stated under which circumstances this had happens and when an appeal is deemed abandoned it cannot be revived.

- [12] So, in my judgment the effect of Order 59 rule 17 (3) is that no subsequent application for enlargement of time to file a Notice of Appeal regarding the same decision be logically allowed. If allowed it would create a mischief to the 'deeming provision'. Such an interpretation is not preferred.
- [13] It should also be noted the contextual interpretation of the Order 59 rule 17(3) of High Court Rules also supports that no application for enlargement of time for a 2nd Notice of Appeal, be allowed when an appeal is already deemed abandoned on the initial Notice of Appeal.
- [14] If an enlargement application is allowed it would be a waste of courts time too. Due to a default of a party the appeal is deemed abandoned, and what is the utility of such deeming provision if the same defaulting party is allowed to make an application for enlargement of time for 2nd Notice of Appeal. If such applications are allowed, Order 59 rule 17(3) of High Court Rules will only become a bane in the appeal process, without any useful application. Such an interpretation is to be avoided.
- [15] So in my judgment the application for enlargement of time to file another Notice of Appeal against the Master's decision should be struck off in limine without considering the merits.
- [16] The cases mentioned in the written submission does not deal with situation where a deeming provision had come in to operation and appeal is deemed abandoned.


Conclusion

- [17] Once a Notice of Appeal is filed within the time against a decision of the Master in terms of the High Court Rules and the appeal is deemed abandoned in terms of Order 59 rule 17(1) there is no room to circumvent the 'deeming provision' by seeking to file enlargement of time to file 2nd Notice of Appeal against the same determination. The application is struck off. The cost of this application is summarily assessed at \$1,500.

Final Orders

- [18] a. The Inter partes summons seeking extension of time to file Notice of Appeal against the Master's decision is struck off.
- b. Cost of this application is summarily assessed at \$1,500.




Deepthi Amaratunga
Judge