

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Civil Action No.: HBC 119 of 2017

BETWEEN : **THE AH KOY CHRISTIAN FUND** of 51-55 Forster Road, Walu Bay,
Suva.

PLAINTIFF

AND : **SENIOR PASTOR SAMISONI SERU** of Gracefield Christian
Fellowship of 38 Nasevou Street, Lami

DEFENDANT

Counsel : Mr. Singh A. for Plaintiff
Mr. Vananalagi R. for Defendant
Date of Hearing : 17 July, 2018
Date of Decision : 24 July, 2018

DECISION

INTRODUCTION

1. This is an application for seeking leave to appeal out of time and also seeking enlargement of time for an appeal against the decision of Master granting eviction of the Defendant from a premises. Master's decision was made since there was no appearance for the Defendant, though he was served with the notice on 8th May, 2017 and the order for eviction was made on 31st May, 2017.

ANALYSIS

2. Order 59 rules 10 and 11 of the High Court Rules of 1988 states as follows

'10.-(1) An application to enlarge the time period for filing 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 expiration of that period.'

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

Application for leave to appeal (O.59, r.11)

*'11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, **filed and served** within 14 days of the delivery of the order or judgment.'*
(emphasis added)

3. The Order 59 rule 10 applies to the enlargement of time for **Notice of Appeal or Cross Appeal.**
4. On 31st May, 2012 the Master made orders for eviction of the Defendant from the land described in Lease no 11550. Admittedly despite the service of the summons the Defendant did not appear before Master and or filed any affidavit in opposition to the summons for eviction.
5. This order was served to the Defendant on 13th June, 2017, an application for set aside the Master's order was filed on 26th September, 2017 but Defendant, again failed to appear in court on the day listed for hearing of the summons and the summons was struck off for non- appearance as well as for the wrong procedure adopted.
6. After striking out of the said summons a fresh summons was filed on 16th November, 2017 and it sought to 'set aside the summons for eviction' entered on 31.5.2017.
7. This summons was mentioned twice before this court and on 6.12.2017 the matter was withdrawn by the Defendant, a cost was also ordered summarily assessed.
8. Again on 9th July, 2018 a summons was filed seeking leave to appeal out of time against the order of the Master delivered on 31st May, 2017 and enlargement of the appeal out of time.
9. At the outset the order [a] contained in the summons which seeks Leave to Appeal out of time is struck off as there is not requirement to seek leave to appeal against a final order

of the Master. The order of Master granted in pursuant to a summons filed under Section 169 of the Land Transfer Act, 1971 is a final order irrespective whether the a party decide to oppose such an application or not. The Defendant had admitted service of the summons for eviction within the time period stated.

10. The decision of the Master entered on 31st May, 2017 was an order entered in terms of Section 171 of the Land Transfer Act 1971. It was a final order of the Master in terms of the Court of Appeal decision in Goundar v Minister for Health [2008] FJCA 40; ABU0075.2006S (9 July 2008)(unreported). So the correct procedure was to appeal against such an order, on prima facie defects on the face of the application.
11. Order 59 rule 10 of the High Court Rules of 1988, allows extension of time to file notice of appeal, but this is not a right that that can be invoked without sufficient grounds, specially when there was no affidavit in opposition filed against the eviction.
12. 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)

13. His Lordship Alfred J in High Court, had used this judgment to refuse an extension of time for leave to appeal against an interlocutory decision and His Lordship Ajmeer J in High Court, had also used the said quote to refuse a similar application for extension time for leave to appeal against a Master's decision, in *Mohammed v Khan* 2015] FJHC 728; HBC67.2014 (2 October 2015).
14. The quote, in *Ratnam vs. Cumarasamy and Another* [1964] 3 All E.R. 935 used by both Alfred J and Ajmeer J, did not prohibit enlargement of time. While emphasizing that enlargement could not be readily granted, without any reason, stated '*there must be some material on which the court can exercise its discretion*'.
15. The Defendant had elected not to file any affidavit in opposition to the eviction, and had also not filed any application for appeal within stipulated time period. So, any prospective appeal is restricted to defects on the face of the summons filed by the Plaintiff.
16. Apart from merits of the appeal the delay needs to be explained by the Defendant.
17. The grounds for extension of time cannot be defined precisely, but some of them are as follows
 - a) The interests of justice and specially the failure to exercise extension and consequences. Eg. if the failure to enlarge time would result denial of access to a party.
 - b) Whether the application for extension has been made promptly. If not whether there is any satisfactory explanation to the delay and length of delay is justified.
 - c) Whether the failure to comply was intentional, for eg. non-compliance of unless order, after an extension of time again delaying taking further steps.
 - (d) Whether there is a good explanation for the failure, and whether there was any abuse of the process or bona fides of the application.
 - (e) The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.

- (f) Whether the failure was caused by the party or his legal representatives eg. mistake of law or fact.
 - (g) Effect of extension have on the trial, if the action is still pending before the court.
 - (h) the effect which the failure as opposed to granting extension, on all the parties including interest of public if any.
 - i) If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.
 - j) The effect of extension on case management and right of a party for determination of a civil action without delay.
 - k) Whether the defect is curable, and if so the prejudice to other party.
18. The eviction process contained in the Section 169 of the Land Transfer Act, 1971 are contained in the Section 170 of the Land Transfer Act. The requirements of the summons under said provision are contained in that provision. Accordingly, it shall contain a description of the land and 16 day notice to the Defendant upon service.
19. The service of the summons was 8th May, 2017 and the hearing was on 31st May, 2017 which was more than 23 days and the said summons contained precise description of the land. The Defendant admitted the receipt of the summons and their non-appearance on the dated listed for hearing on the summons.
20. So, I cannot see any merits in the proposed grounds of appeal attached to this application, which intends to challenge the summons of the Plaintiff.
21. The Defendant in the affidavit in support of the extension does not state that he has a right to remain in the land in terms of Section 172 of the Land Transfer Act, 1971. He also had not explained the delay from withdrawal of his summons dated 16.11.2017 to the present application which is more than 8 months.

22. In the circumstances the extension of time to file notice of appeal is struck off. The grounds of appeal are doomed to fail and in an application for extension of time for appeal the burden is with the party seeking extension to show merits that justify a case for more than an arguable case or a case for strong arguable case as laid down

CONCLUSION

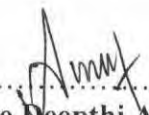
23. The Plaintiff had delayed this application for more than one year and in the meantime twice had filed summons to set aside the Master's decision and one of them was withdrawn whereas the other was struck off by the court for non-appearance and also on merits. The Defendant had not appeared and or filed affidavit in opposition to the eviction. There is no explanation for the Defendant for such a long delay after withdrawal of the last summons filed by them. The conduct of the Defendant indicates an issue relating to bona fide of this application. The proposed grounds of appeal are doomed to fail and this application for extension of time is struck off. The cost of this application is summarily assessed at \$750.

FINAL ORDERS

- a. Summons filed 9th July, 2018 struck off.
- b. Cost is summarily assessed at \$750.



Dated at Suva this 24th day of July, 2018


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Justice Deepthi Amaratunga
High Court, Suva