

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 13 OF 2017

(On appeal from the Judgment of
Hon. Master U.L Mohammed Azhar
delivered on 27th June 2019 at the
High Court of Fiji Lautoka in Civil
Action No. HBC 13 of 2017)

BETWEEN : **AISAKE RAVUTUBANANITU** of Tagitagitua, Tavua,
Businessman.

APPLICANT/ (ORIGINAL PLAINTIFF)

AND : **BASKARAN NAIR** of Koronisalusalu, Tavua, Driver.

RESPONDENT/(ORIGINAL DEFENDANT)

Appearances : Ms A. Koila (o/i/o Nawaikula Esqr) for the applicant/plaintiff
Mr N. Padarath for the respondent/defendant

Date of Hearing : 25 October 2019

Date of Ruling : 02 December 2019

R U L I N G

[on leave to appeal out of time]

Introduction

[01] The ruling concerns an application for leave to appeal out of time.

[02] The plaintiff/applicant (*'the applicant'*) has filed his application supported with an affidavit in support sworn by the applicant, seeking leave of the court to file and serve a notice of appeal out of time (*'the application'*).

- [03] The respondent/defendant (*the respondent*) chose not to file an affidavit in response to the applicant's supporting affidavit.
- [04] At the hearing, counsel appearing for the applicant confined her argument to the written submission she tendered in court. Counsel for the respondent then sought 21 days to file and serve his replying submission. The court accordingly granted 21 days to the respondent to file and serve his written submission. However, he did not file his submission.
- [05] It will be noted that the parties agreed to rely on written submissions rather than oral arguments.

Background

- [06] The applicant intends to appeal the decision of the learned Master (*the Master*) delivered on 27 June 2019 which dismissed a summons for ejectment filed by the applicant under O 113 of the High Court Rules 1988, as amended (*the HCR*).
- [07] The current application has prompted subsequent to his initial appeal was deemed abandoned as a result of non-compliance of the HCR, i.e. by operation of O 59, R 17 (3) in that the applicant failed to file and serve a summons for directions and a date for the hearing of the appeal within 21 days of the filing of notice of appeal.
- [08] Initially, the applicant filed his notice of appeal within the time limit prescribed by the HCR, 59, R 9, which is 21 days from the date of the delivery of the Master's judgment or order.
- [09] On 19 August 2019, his initial appeal was deemed abandoned by virtue of the HCR, O 59, R 17.
- [10] The applicant now applies for an order granting enlargement of the time period for filing and serving a notice of appeal.

The law

[11] The application is made under O 3, R 4 and O 59, R 10 of the HCR.

[12] The HCR, O 3, R 4 provides:

Extension etc of time (O3, R4)

- 4.-(1) *The court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings.*
- (2) *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*
- (3) *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose, provided that wherever the period for filing any pleading or other document required to be filed by these Rules or by the Court is extended whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in Appendix 2 by the party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.*

[13] The HCR, O 59, R 10, dealing with extension of time, states:

Extension of time (O59, R10)

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 the expiration of that period.*

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

Government Principles

[14] The governing principles applicable to an application for extension of times include: 1. Length of delay, 2. Reasons for delay, 3. Degree of prejudice to the respondent and 4. Prospects of success if leave is granted.

Discussions

[15] This is an application for extension of time to appeal the Master's decision of 27 June 2019, dismissing the applicant's summons for ejection file under O113.

[16] I will consider this application in light of the background given in paragraph 6 of this judgment.

[17] The applicant filed his initial appeal within the prescribed time limit (21 days), and that appeal was deemed abandoned for non-compliance of the Rule (R 17 (2)) by operation of R 17 (3), HCR.

[18] Rule 17 states: (1) the appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of 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.

[19] In this initial appeal, the applicant filed a summons for directions and a date for the hearing of the appeal, but the same was not served on the respondent as required by R 17(2). This has triggered R 17 (3), which says that if the Rule is not complied with, the appeal is deemed to have been abandoned. Thus, the appellant's previous appeal was deemed abandoned on 19 August 2019.

Length of delay

[20] The current application for leave to appeal is made on 29 August 2019. Some 10 days after the initial appeal was deemed abandoned. If calculated from the date of the Master's decision 27 June 2019, excluding the 21 days allowed for appeal, the delay is some 43 days.

[21] In my opinion, the delay is not too long and it is not intentional.

Reasons for delay

[22] The applicant explains the reasons for the delay. He says: that he filed and served affidavit of service on 2 August, on 8 August, he filed a summons for direction at the Registry, where he collected the document on 16 August and was to be called on 19 August.

[23] The respondent opted not to file an affidavit in response to the applicant's supporting affidavit saying there is nothing much in that supporting affidavit.

[24] It appears that failure to serve the summons for directions in respect of the applicant's initial appeal was due to a genuine mistake on the part of his solicitor. Otherwise the applicant was prosecuting his initial appeal up to the point it was deemed abandoned, for not complying with the HCR (O 59, R 17 (2)).

[25] I am satisfied with the explanation given by the applicant for the delay.

[26] This application has been made to this court after the expiration of the period permitted for appealing the Master's order or judgment (see O 59, R10).

[27] The Court has the discretion to extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceeding (see: HCR, O3, R 4(1)).

Prejudice

- [28] There is no affidavit by the respondent explaining the specific degree of prejudice that would be caused to him if time for appealing is granted.
- [29] I do not think that the respondent will be prejudiced by an order granting extension of time for appealing. He will get the opportunity to challenge the appeal.

Prospect of success of appeal, if leave is granted.

- [30] I have had a cursory look at the proposed grounds of appeal. The proposed grounds of appeal raise the following issues to be determined by the appeal court:
1. Whether payment of rent creates a tenancy.
 2. Whether the consent of the Mataqali members confers a legal right to possession of land.
 3. Whether defendant derives any right from his father's Estate over the land after the expiry of the lease.

- [31] Provisionally, I am of the opinion that the proposed grounds of appeal raise some arguable legal points for the decision of the appeal court.

Conclusion

- [32] For the reason I have set out above. I find that it is an appropriate case for the court to enlarge the time period for filing and serving a notice of appeal against the Master's judgment dated 27 June 2019. I accordingly enlarge the time period for filing and serving a notice of appeal against the Master's judgment. This follows that the applicant shall file and serve a notice of appeal within 14 days of the date of this ruling. Thereafter, he shall file an affidavit of service within 7 days of such service and within 21 days of the filing of notice of appeal, file and serve a summons for directions and a date for the hearing of the appeal.

[33] The costs shall be in the appeal.

The result

1. The time period for appealing the Master's judgment dated 27 June 2019 is extended.
2. The applicant shall file and serve a notice of appeal within 14 days of the date of this ruling.
3. The applicant shall file an affidavit within 7 days of such service.
4. The applicant shall file and service a summons for directions and a date for the hearing of the appeal within 21 days of the filing of notice of appeal.
5. The costs shall be in the appeal.

M.H. Mohamed Ajmeer
..... 2/12/19

M.H. Mohamed Ajmeer

JUDGE



**At Lautoka
2 December 2019**

Solicitors:

For the applicant: Nawaikula Esquire, Lawyers

For the respondent: Samuel K Ram, Barrister & Solicitor