

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

CIVIL ACTION NO: HBA: 20 OF 2018

BETWEEN : **ARVIND KUMAR** father's name Jai Ram now of 1175 Chasapaeke Drive, Pittsburg, CA 34565, United States of America.

APPELLANT
ORIGINAL 2ND DEFENDANT

A N D : **SAM MANI** father's name Ester Ram of Penrith, New South Wales, Australia, Managing Director.

1ST RESPONDENT
(ORIGINAL PLAINTIFF)

A N D : **CORAL COAST TOURS FIJI LIMITED** a limited liability company having its registered office at Sigatoka, Fiji.

2ND RESPONDENT
(ORIGINAL 1ST DEFENDANT)

Appearances : **Mr. Dorsamy Naidu for the Appellant**
(Ms.) Arthi Swamy for the First Respondent
Second Respondent is absent and unrepresented.

Date of hearing : **Friday, 03rd May, 2019**

Date of ruling : **Friday, 07th June, 2019**

R U L I N G

[1] The appellant (Original second defendant) filed summons on 12th February, 2018 for an extension of time to file Notice of Intention to Appeal the decision of the Resident Magistrate in Action No. 16 of 2009.

[2] After hearing the appellant and the first respondent, the Court made the following orders in the written ruling dated 12th October, 2018.

ORDERS:

- (1) *The application for extension of time to lodge Notice of Intention to Appeal is granted.*
- (2) *The applicant to file and serve Notice of Intention to Appeal on the Respondents within 07 days from the date of this Ruling.*
- (3) *The execution of the Judgment is stayed until the determination of the appeal.*
- (4) *As the application to extend the time involves granting of an indulgence for the applicant, it is appropriate that there be no order for costs.*

[3] Pursuant to the above order, the appellant **filed** Notice of Intention to Appeal in the Magistrate's Court on 23rd October, 2018. The appellant took out summons for directions on 08.02.2019 seeking directions from this Court as to the future course of the appeal.

[4] Now there are two 'preliminary objections'. Two preliminary objections to the hearing of the appeal are raised by (Ms.) Swamy, Counsel for the first respondent. (Ms) Swamy submitted that;

- (A) The Notice of Intention to Appeal was filed and served out of time and there was, therefore, in this case non-compliance with the provisions in Order 37, rule 1 of the Magistrate's Court Rules which sets out the time within which Notice of Intention to Appeal shall be filed and served. Counsel submitted that the appeal must be dismissed due to non-compliance with the mandatory provisions in Order 37, rule 1 of the Magistrate Court Rules.
- (B) The Summons for Directions seeking directions from the Court as to the future course of the appeal was filed and served out of time and there was, therefore, in this case non-compliance with the provisions in Order 59, rule 17 of the High Court Rules, 1988.

[5] Counsel for the first respondent, (Ms) Swamy concludes by saying that the appeal is deemed to be abandoned due to non-compliance with the provisions in the Magistrate Court Rules and High Court Rules. Counsel cited the following cases in argument.

- (A) Whittaker v Bank of the South Pacific Ltd (2017) FJHC 439

(B) Deo v Ascot Motors Proprietary Ltd (2011) FJHC 782

[6] I now turn to the appellant, Mr. Naidu Counsel for the appellant submitted that;

- (A) The Notice of Intention to Appeal was received by the Magistrate's Court Registry on 18th October, 2018.
- (B) The Magistrate's Court Registry filed it on 23rd October, 2018 (ie, 5 days later).
- (C) After receiving the document on 23rd October, 2018 it was served on the respondents on 25th October, 2018.
- (D) The delay of filing the Notice of Intention to Appeal was on the part of the Magistrates' Court Registry and the appellant cannot be held accountable for that.
- (E) It is an irregularity and the appellant is entitled to invoke Order 2, rule 1(2) of the High Court Rules to cure the non-compliance.
- (F) With regard to Summons for Directions, the provisions of the High Court Rules cannot be invoked because this is an appeal against the judgment of the Resident Magistrate and not a decision against the Master of the High Court.
- (G) The respondents did not raise any objections on the returnable date of the Summons for Directions and has taken further steps in the proceedings without raising the issue of irregularity on returnable date.

[7] Turning to the period of delay in filing and serving the Notice of Intention to Appeal, Counsel for the appellant submitted that the length of the delay is a matter of days and is therefore excusable. Counsel cited the following cases in argument.

- Venkatamma v Ferrier Watson (1995) 41 F.L.R. 258
- Ferrier Watson v Mohammed (1992) FJCA 20

[8] Pursuant to the order of this Court, the Notice of Intention to Appeal was to be filed and served on or before 19th October, 2018. As can be observed from the Magistrates' Court Record, the Notice of Intention to Appeal filed by the appellant bears two different dates on the stamp. The **received stamp** shows that the document was received by the Magistrates Court on 18th October, 2018. The **filed stamp** shows that it has been filed on 23rd October, 2018. The reason as to why two different dates are on the stamp is explained as follows by the Assistant Court Officer, Civil Section, in the Magistrate Court of Nadi.

MINUTE

TO: The Civil Clerk, High Court ,Lautoka.

**SUB: NADI CA :16/09 SAM MANI VS CORAL COAST TOURS(FJ)LTD & ARVIND
KUMAR**

With respect to the above .

The Counsel for the Appellant had filed Notice to Appeal on 18th October,2018 and I had received the document on the same day using the received stamp however the Counsel did not have the filing fees to pay the documents on the same date.

On 23/10/18 the Filling fees for Notice of Intention to appeal was then paid than the document was filed .

That is the reason why two different dates are on the stamp.

Submitted for your information.



.....
Kasanita Wati

ACO

Civil Section.

4/6/19

The letter effectively nullifies the appellant's assertion that; (reference is made to paragraphs 6.3 and 6.5 of the appellant's written submissions filed on 10-05-2019).

- (6.3) *The Notice of Intention to Appeal was received by the Court registry on the 18th October, 2018 therefore it had been ready for filing and execution of service that same day. However, that was not the case as the Court registry had filed it 05 days after receiving the same.*
- (6.5) *The delay in this instance was not in our hands to control as the Registry had received our Notice of Intention to Appeal on the 18th October, 2018 (01 day before due date). It was mere mismanagement in administrative process by the Registry and the Appellants cannot be held accountable for the same.*

(Emphasis added)

Thus, the appellant's assertion that ".....*it had been ready for filing and execution of service that same day*" is nothing more than a web of deceit. The clear position that emerges from the letter is that the 'Notice of Intention to Appeal' was not ready for filing on 18th October, 2018. The appellant after having obtained the comfort of the order extending 07 days to file Notice of Intention to Appeal did not file within the extension period and thereby disregarded the Orders of this Court. **The concern here is that the appellant falsely and repeatedly misinformed this Court that;**

The Notice of Intention to Appeal was received by the Court registry on the 18th October, 2018 therefore it had been ready for filing and execution of service that same day. However, that was not the case as the Court registry had filed it 05 days after receiving the same.

The delay in this instance was not in our hands to control as the Registry had received our Notice of Intention to Appeal on the 18th October, 2018 (01 day before due date). It was mere mismanagement in administrative process by the Registry and the Appellants cannot be held accountable for the same.

This is the conduct of the appellant.

The Court cannot give the appellant an indulgence. The Notice of Intention to Appeal has not been filed in the Magistrate's Court within the period stipulated by this Court. The appeal is deemed to be abandoned. That really concludes the matter and the appeal should be dismissed. In view of the approach I have adopted, the second preliminary objection does not call for consideration. The first preliminary objection based on the provisions of Order 37, rule 1 of the Magistrates' Court Rules has no substance and it falls away. The question before the court arises upon the appellants' flagrant disregard of

the order of this court made on 12th October, 2018 and not upon the provisions of Order 37, rule 1 of the Magistrates' Court Rules.

ORDERS:

1. Appeal dismissed.
2. The appellant is ordered to pay costs of \$500.00 (summarily assessed) to the first respondent within 14 days hereof.

**Jude Nanayakkara
Judge**

**At Lautoka,
Friday, 07th June, 2019**