

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. 11 of 2018

Nasinu Magistrate's Court Civil Case No. 102 of 2016

BETWEEN

G. RAJ CONSTRUCTION a limited liability company having its registered office at
Valelevu, Nasinu.

PLAINTIFF / APPELLANT

AND

NITESH KUMAR and **ROTISHKA VANDHU KUMAR** both of Waila 3B Nausori,
School Teachers.

DEFENDANTS / RESPONDENTS

Counsel : Mr. Gounder R. for the Appellant
Respondents in person

Date of Hearing : 26th June, 2019

Date of Judgment : 30th July, 2019

JUDGMENT

- [1] The appellant instituted these proceedings to recover \$12,714.25 from the respondents.
- [2] The appellant is a building construction company. The respondents on 06th December, 2015 entered into an agreement whereby the appellant agreed to construct a building for the respondents. The appellant's case is that the respondents after sometime stopped payments and a total of \$12,545.00 is now due and owing from the respondents.
- [3] The position of the respondents is that the appellant failed to complete the work within the period as agreed and also there were certain defects in the construction work. The respondent claimed from the appellant \$18,500.00 as the costs the defendant would incur to rectify the defects and for the boundary fence work and \$3,900.00 for loss of rental income.
- [4] The learned Magistrate dismissed the claim of the appellant and entered judgment in favor of the respondents as prayed for in the statement of defence.
- [5] Being aggrieved by the decision of the learned Magistrate the appellant appealed to this court on the following grounds:
1. The learned Trial Magistrate erred and/or misdirected himself in law and in fact in arriving at a figure of \$18,500.00, loss of rental income in the sum of \$3,900.00 and costs assessed at \$1,000.00.
 2. The learned Trial Magistrate erred and/or misdirected himself in claiming for the rental amount for six months from 1st May to 1st October, 2016 when in fact the respondent had given an extension until 30th June, 2016 to complete the house.
 3. The learned Trial Magistrate erred and/or misdirected himself when he did not consider the expenses the appellant used to purchase the material the appellant bought for stage 8 as well as work done on stage 8.
 4. The learned Trial Magistrate erred and/or misdirected himself when he failed to consider and/or to discuss that in stage 6 of the construction the

stage was not complete yet the respondent decided to pay out the amount allocated for this stage without stage 6 being unsatisfactorily done.

5. The learned Trial Magistrate erred and/or misdirected himself in not relying on the evidence tendered by the appellant which led to him arriving at a wrong conclusion.
6. The learned Trial Magistrate was biased when he gave special preferences to the defendants by setting the hearing down at 4.30 on two occasions.
7. The learned Trial Magistrate erred and/or misdirected himself when he refused the appellant's application to file his reply to defence and defence to counter claim out of time.
8. The learned Trial Magistrate erred in law and in fact when he refused the appellant's application to stay the proceedings until the appeal filed is heard and determined by the High Court.
9. The learned Trial Magistrate erred and/or misdirected himself when delivered a ruling on 8th May 2017 titled ruling for leave to amend statement of claim when in fact there was no such application made but rather there was an application by the appellant for leave to filed reply to statement of defence and defence to counter claim out of time dated 16th February, 2017.
10. The learned Trial Magistrate erred and/or misdirected himself when he did not consider the evidence tendered by the appellant that he had done some work on stage 8 before rescinding the contract.

[6] At the hearing of the appeal the learned counsel for the appellant informed court that the appellant does not wish to pursue the 6th ground of appeal.

[7] The learned counsel for the appellant at the commencement of the hearing informed court that he would only rely on the written submissions filed.

[8] Out of the grounds of appeal referred to above I will first consider the 7th and 9th grounds of appeal.

[9] On 09th March, 2017 the appellant filed a notice of motion seeking leave to file and serve its reply to the statement of defence and counter claim out of time and the respondents filed their affidavit in opposition on 20th March, 2017. The learned Magistrate delivered the ruling on 08th May, 2017 and the final orders made are as follows:

1. Leave to amend the statement of claim is denied.
2. The matter is to be called again on 31st May, 2017 at 4.00pm.

[10] The ruling is under the heading of "RULING FOR LEAVE TO AMEND STATEMENT OF CLAIM" and the paragraph one on the ruling reads as follows:

The plaintiff filed notice of motion seeking leave to file an amended statement of claim and counterclaim out of time. This was accompanied by an affidavit in support of the motion.

[11] There is no application seeking leave to amend the statement of claim. The application before the court was seeking leave to file and serve reply to the statement of defence and defence to the counter claim.

[12] The matter has proceeded to trial without a reply to the statement of defence and the counterclaim which is prejudicial to the appellant. The learned Magistrate's judgment awarding the claim of the respondent without allowing the appellant to file its defence to the counterclaim in my view is unfair.

[13] The appellant filed notice of intention to appeal on 15th May, 2017 against the decisions made on 3rd May, 2017 and 5th May 2017. The ruling dated 3rd May, 2017 is from an order granting adjournment with \$900.00 costs. I do not find any ruling made on 5th July, 2017. The ruling of the learned Magistrate on the notice of motion seeking extension of time to file reply to the statement of defence and defence to the counterclaim was made on 08th May, 2017. The application for stay pending appeal was refused by the learned Magistrate. There is nothing on record indicating what happened to the appeal.

[14] In the affidavit filed in support of the notice of motion seeking leave to file and serve reply to the statement of defence and defence to the counterclaim out of time the appellant states that there was another civil action (82 of 2016) between the same parties and the solicitors in fact prepared a response to the defence but later realised that it was the response in the matter that had already been struck out.

[15] It is the view of this court that granting an extension to file and serve reply to the statement of defence and defence to the counterclaim out of time will not cause any

prejudice to the respondents and it would have assisted the court to arrive at the correct conclusion.

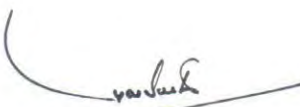
[16] For these reasons I hold that the learned Magistrate erred in not granting leave to the appellant to file and serve reply to the statement of defence and defence to the counterclaim out of time.

[17] Since the judgment of the learned Magistrate is liable to be set aside on the above grounds I will not consider the grounds based on the findings of the lower court on fact.

ORDERS

1. The appeal of the appellants is allowed.
2. The judgment of the learned Magistrate delivered on 01st November, 2017 is set aside.
3. The matter is sent back to the Magistrate's Court for a fresh hearing before another Magistrate.
4. The appellant is granted 21 days from the date of this judgment to file the reply to statement of defence and statement of defence to the counter claim.
5. There will be no order for costs of this appeal.




Lyone Seneviratne

JUDGE

30th July, 2019