

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. HBC 13 of 2019

On Appeal from the
Ruling of the Master in the
High Court Civil Action
No. HBC 13 of 2019
delivered on the 3rd day of
October 2019.

BETWEEN : LINDA VERMA
: ROBERTA TUIVUNILAGI
: FRANCES VERMA
: FRANCES TUIVUNILAGI
: TREVINA TUIVUNILAGI

APPELLANTS/ DEFENDANTS

AND : MAREEN ARUNA YOUNG aka MAUREEN ARUNA
VERMA and USHA REAMS aka USHA VERMA aka
USHA GRANCES REAMS

RESPONDENTS/ PLAINTIFFS

BEFORE : M. Javed Mansoor, J

COUNSEL : Mr. V. Singh for the plaintiff
: Mr. G. O’Driscoll for the defendant

Submissions : Filed by the Respondents on 18 November 2019

Date of Ruling : 15 June 2020

RULING

HIGH COURT RULES: APPEAL Appeal from the Master – Appeal out of time – Failure to comply with the rules of court – Appeal deemed abandoned – Order 59 Rules 9, 10 & 17 of the High Court Rules – Section 169 of the Land Transfer Act 1971

The following cases are referred to:

- a. *Gay and Beall v Resolution Trust Corporation and others* [2010] FJHC 268; HBA 01.2009 (26 February 2010)
 - b. *Ports Authority of Fiji v C & T Marketing Limited* [2001] FJCA 1; ABU 0004.2001S (22 February 2010)
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1. The respondents filed an originating summons dated 15 January 2019, seeking from the appellants, vacant possession of the property, situated at 5 Kings Road, Nasinu, comprised in certificate of title no. 8297, in terms of section 169 of the Land Transfer Act 1971. Thereafter, the Hon. Master made an order setting out a timetable for filing of affidavits by the parties, against which order the respondents sought and obtained leave to appeal. Following my ruling dated 12 June 2019 on that interlocutory appeal, the matter was remitted to the Master for cause to be shown by the appellants as to why they should not give up possession of the subject land in terms of section 169 of the Land Transfer Act.

2. After hearing both parties, the Hon. Master, by order dated 3 October 2019, granted vacant possession of the property to the respondents. Thereafter, on 24 October 2019, the appellants filed an appeal against the decision of the Hon. Master, premised on the grounds reproduced below:
 1. *That the Learned Master erred in law and in fact in not holding that the Appellants had in all the circumstances as disclosed in the evidence shown cause pursuant to Section 172 of the Land Transport Act and had a “right to possession” of the said property.*
 2. *The Learned Master erred in law and in fact in –*
 - i. *Not taking into account the clear existing equitable interest of the Appellants/Defendants and which it was duly supported by a caveat lodged under Lodgment No. 396693, dated 20/10/7, long before the said property was transferred to the Plaintiffs;*
 - ii. *Not taking into account Civil Action No. 209 of 2018 and whereas many of the contentions raised had already appeared in the affidavit in opposition of the same;*
 - iii. *Not taking into account that steps were already taken to nullify the Will of the Plaintiff's late mother considering their late matters¹ poor health condition when the said Will was made.*
 3. *The Learned Master erred in Law and in fact in holding on the totality of the evidence placed before her that there was an arguable issue necessitating a proper trial and that the Respondent/Plaintiffs application was in all circumstances misconceived and/or inappropriate for summary adjudication pursuant to Section 169 of the Land Transfer Act.*
4. When this appeal was listed before me on 12 November 2019, counsel for the respondents raised a preliminary issue that there was no valid appeal in terms of Order 59 Rule 9 of the High Court Rules, and that an affidavit of service was not filed within 7 days as required by the rules. Counsel for the appellants

¹ Presumably, refers to “mother’s” poor health

submitted that he needed further time for clarifications. The respondents contended that the appeal is not properly constituted and should either be struck out or declared as deemed abandoned. The parties were, thereupon, directed to file submissions on the question whether a valid appeal has been referred to this court, and the preliminary issue was set for ruling on written submissions. The respondents filed their submissions on 18 November 2019. However, the appellants have thus far not filed their submissions.

5. In their submissions, the respondents contended that in terms of Order 59 Rule 9, the appeal should have been filed and served within 21 days of the delivery of the judgment by the Master, which was on 3 October 2019, and that though the time for filing expired on 24 October 2019, the notice of appeal was served on the respondents on 4 November 2019, and was 11 days out of time as a result. The respondents point out that no application was made for extension of time under Order 59 Rule 10 of the High Court Rules.
6. The respondents submitted that the appellants were also in breach of Order 59 Rule 17 (1) and (2) of the High Court Rules as the appellants had failed to file and serve an affidavit of service within 7 days of filing the notice of appeal and also failed to file a summons for directions on the appeal and a date for the hearing of the appeal within 21 days of filing the notice of appeal as required by these rules, and, therefore, the appeal is deemed to be abandoned in terms of Order 59 Rule 17 (3).
7. Order 59 Rule 9 states that an appeal from an order of a judgment of the Master must be *filed and served* within 21 days from the date of the delivery of an order or judgment; or, in the case of an interlocutory order or judgment, it must be filed and served within 7 days from the date of the granting of leave to appeal.
8. The affidavit of service is not before court and the respondents' claim of delayed service of the notice of appeal cannot be ascertained from the record, as should have been made possible if the affidavit of service was filed of record as mandated by the rules. Nor is the claim of delayed service of the notice of appeal refuted on behalf of the appellants. The failure to file the affidavit of

service within the stipulated time must be considered a breach of a mandatory rule inviting the sanction imposed by Order 59.

9. I agree with the submissions of the respondents that the Master's order is a final judgment and as such Order 59 Rule 9 (a) applies. There is no evidence that the appellants complied with the requirement to file and serve the notice of appeal within the given time of 21 days. The appellants have also not asked for an extension of time as provided for by Order 59 Rule 10.
10. Order 59 Rule 10 (1) states that 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 the period. An application must be made by way of an *inter partes* summons supported by an affidavit².
11. In the absence of an application for extension of time in accordance with the rules, the appellants' notice of appeal cannot be considered valid.
12. The record also does not disclose the filing of a summons seeking directions and a date for hearing within 21 days. However, as the appeal was listed before court on 12 November 2019, within that period after the filing of the notice of appeal on 24 October 2019, the breach does not materially affect the progress of the appellate process, and, in this case, it is an omission that could be excused by court.
13. Order 59 Rules 17 (1), (2) & (3) of the High Court Rules state:
 - “(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.

² Order 59 Rule 10 (2) of the High Court Rules

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

14. In *Gay and Beall v Resolution Trust Corporation and others*³, the High Court stated, “The Rules in Part II of Order 59 have imposed a strict timetable for the filing and serving of documents at the registry and on the respondents. The purpose of the Rules was obviously to avoid delay at the interlocutory stage of civil proceedings and to make such appeals more efficient. The provision in Rule 17 (3) that failure to follow Rules 17 (1) and 17 (2) leads to an *automatic abandonment* of the appeal is intended to operate as a deterrence in respect of delay”. Delivering the judgment, Calanchini J (as he then was) said, “As a result I find that the appeal is deemed to have been abandoned under Rule 17 (3) as a result of non-compliance with Rule 17 (2). I also find that the notice of appeal was not filed within the time prescribed by Rule 9 and that no application was made under Rule 10. There was no explanation provided for non-compliance with those Rules”.
15. The failure to follow rules resulted in the dismissal of a notice of appeal filed in the Court of Appeal in *Ports Authority of Fiji v C & T Marketing Limited*⁴. In that case, the Court said that to allow the appellant, either inadvertently or deliberately, to delay the appellate process would clearly violate the purpose of the rules. The Court of Appeal held that non-compliance with the rules of the court may be fatal to an appeal, especially in the absence of any special circumstances.
16. This court has taken cognizance of the particular object of section 169 and the summary process outlined in the enactment. In this context, the failure to comply with mandatory procedural requirements of the law, resulting in delays in the appellate process and violating the purpose of the law, must be viewed with particular concern.

³ [2010] FJHC 268; HBA 01.2009 (26 February 2010)

⁴ [2001] FJCA 1; ABU 0004.2001S (22 February 2010)

17. The court holds that there is merit in the preliminary issues raised by the respondents. The appellants have not satisfied court that the appeal is valid notwithstanding the failure to comply with the rules of court. Indeed, there are no submissions at all on behalf of the appellants. In these circumstances, it must be concluded that this appeal is abandoned as enacted by Order 59 Rule 17 (3). The appeal is, in any event, out of time in terms of Order 59 Rule 9 (a) of the High Court Rules.

ORDER:

- A. The appellant's notice of appeal filed on 24 October 2019 is deemed abandoned.
- B. The appellants are directed to pay the respondents a sum of \$1,500 as costs summarily assessed within 21 days of this ruling.

Delivered at Suva this 15th day of **June**, 2020



M. Javed Mansoor
Judge

Solicitors:

O'Driscoll & Company (*for the appellants*)

Parshotam Lawyers (*for the respondents*)