

**IN THE HIGH COURT OF FIJI AT SUVA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 132 of 2019**

**IN THE MATTER** of the Land transfer Act 1971, Section 109.

**AND**

**IN THE MATTER** of an application to remove Caveat No. 873707 lodged by

**HOTEL & RESPT INVESTMENT HOLDINGS PTE LTD** against

Certificate of Title No. 38013, the property of

**HOTEL EQUIPMENT LIMITED.**

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**BETWEEN**

**HOTEL & RESORT INVESTMENT HOLDINGS PTE LTD** a limited

liability company having its registered office at

Concave Drive, Namaka, Nadi in the

Republic of Fiji.

**DEFENDANT – APPELLANT**

AND

**BANK OF SOUTH PACIFIC LIMITED (BSP)** a banking company duly

incorporated in Papua New Guinea and registered in

Fiji as a foreign company with its principle office at

Suva in Fiji.

**PLAINTIFF – RESPONDENT**

**Counsel** : Ms Prasad L. for the Plaintiff-Respondent  
Mr Valenitabua S. (as a representative) for the Defendant-Respondent.

**Date of Hearing** : 18<sup>th</sup> August 2020

**Date of Ruling** : 02<sup>nd</sup> September 2020

**RULING**

[1] The matter before this court is an appeal from the decision of the learned Master of the High Court ordering the removal of caveat No. 873707 lodged by the appellant against Certificate of Title No. 38013, the property of Hotel Equipment Limited.

[2] Since the defendant-appellant failed to comply with the provisions of Order 59 rule 17 this court in its ruling dated 01<sup>st</sup> November 2019 ordered that the appeal of the defendant-appellant be deemed abandoned.

[3] The defendant-appellant then filed summons for reinstatement, enlargement of time and leave appeal the judgment of the learned Master and the hearing of the summons was fixed for 21<sup>st</sup> February 2020 with the consent of both counsel.

[4] On the day of the Hearing the defendant-appellant was absent and unrepresented and the court struck out the summons with costs of \$2000.00.

[5] On 28<sup>th</sup> February 2020 the defendant-appellant filed summons seeking to set aside the order striking out the summons for extension of time to appeal.

[6] Order 32 rule 5(4) provides:

Where an application made by summons has been dismissed without a hearing by reason of the failure of the party who took out the summons to attend the hearing, the Court, if satisfied that it is just to do so, may allow the summons to be restored to the list.

[7] In **Hansraj and Company Ltd v National Insurance Company** [2004] FJHC 381; HBC0181.1990L (1 March 2004) the court quoted the following paragraph from The Supreme Court practice (1991):

*“Paragraph (4) embodies the present practice, under which if a summons or a case is not heard, but is dismissed or merely struck out for non-attendance of the party whose summons it is, the court may, if satisfied that it is just to do so, allow the summons to be restored to the list and to hear or entertain it, even though the order dismissing it has been drawn up.”*

[8] Order 35 rule 5(4) confers a discretion on the court to reinstate an action that was dismissed for want of appearance. In exercising such discretion the court will have to consider the following factors;

1. Adequate reason must be given for non-appearance;



2. The application to reinstate must be made promptly; and
3. Prejudice to the parties if the reinstatement is granted or refused.

- [9] There is no issue of delay in filing the application the order was made by the court on 21<sup>st</sup> February 2020 and the application was filed on 28<sup>th</sup> February 2020 that is on the 7<sup>th</sup> day from the date of the order sought to be challenged.
- [10] The next question is whether the reasons for non-appearance given by the appellant are adequate for the court to set aside its order.
- [11] Mr. Simone Valenitabua, the solicitor of the appellant has given many reasons for his failure to appear in court. Firstly, he noted down the date of hearing wrongly. The court after consulting both counsel only the hearing date was fixed. Mr. Valenitabua tendered the Court Appearance Minute to substantiate this position. In that he also has written “File Submissions ASAP” which was never ordered by the court. Further, below the next date of the matter it is written “**21.2.2020 Advised by Praneel of High Court**”. This shows that he has clarified the next date of the matter from the Court Clerk. In the circumstances the position taken up by the appellant’s solicitor that he mistakenly believed the matter was to be heard on 21<sup>st</sup> April 2020 has no basis.
- [12] The other ground relied on by the appellant’s solicitor is that on the day the matter was fixed for hearing he was forced to attend a Criminal Workshop organised by the Fiji Law Society to get five points for his Practicing Certificate 2020. This workshop could not have been organised by the Fiji Law Society in a week or two. When the court nominated the hearing date Mr. Valenitabua could have known that he had to attend the workshop and should have informed court that he would not be free to attend court on 21<sup>st</sup> February 2020.
- [13] He has also averred in his affidavit that due to an accident he was admitted to Oceania Hospital and was there for four days and in support of that he tendered a medical certificate.
- [14] However, he had had no difficulty in bringing to the notice of the court or at least to the registry about his difficulties or to send another lawyer to court on the day of the hearing, not to conduct the hearing but to inform court that Mr. Valenitabua’s difficulty in attending court.

- [15] From the above it appears that Mr. Valenitabua has not acted in a responsible manner in looking after the interest of his client.
- [16] The next issue is whether any prejudice would be caused to the appellant if that application set aside the order of this court, as submitted by the learned counsel for the appellant.
- [17] The learned Master of the High Court removed the caveat and it is common ground that the property mortgaged by the Hotel Equipment Limited has already been sold by a mortgagee sale. The interest of the defendant in the property is that it had entered into a sale and purchase agreement with the Hotel Equipment Limited to purchase this property. Since the property has already been disposed of by the respondent no prejudice would be caused to the appellant if the order of this court striking out the application for leave to appeal out of time is not reinstated.
- [18] The learned counsel for the appellant submitted that there was no legal representation for the appellant before the Learned Master.
- [19] Order 5 rule 6 of the High Court rules 1988 provides:
- (1) Subject to paragraph (2) and to Order 80, rule 2, any person (whether or not he sues as a trustee or personal representative or in any other representative capacity) may begin and carry on proceedings in the High Court by a barrister and solicitor or in person.
  - (2) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any such proceedings otherwise than by a barrister and solicitor.
- [20] In this matter the appellant was not represented by a solicitor or barrister. One of the directors of the company filed all the affidavits and other documents in court. The learned counsel for the appellant faulted the court for the mistakes of his own client. The court is not expected to give legal advice the litigants. They must know what the procedure to be followed in instituting proceedings before a court of law. It is a universally accepted principle of law that ignorance of law is not an excuse (*ignorantia juris non excusat*). If a party follows a wrong procedure they will have to bear the consequences of their own mistake.



[21] The learned counsel for the appellant submitted on the law of Equity of Redemption and cited various authorities in support of his submission. Equity gives right to pay off loan and terminate mortgage by the successful repaying of the mortgage debt. It is the mortgagor who is entitled to claim such a right. In this matter the mortgagor is not a party to these proceedings. The mortgagor company, Hotel Equipment Limited, has already been wound up. Therefore, the law of Equity of Redemption has no application to the facts of this matter.

[22] For the reasons set out above the court is of the view that no prejudice would be caused to the appellant if the court refuses the application to set aside the ruling striking out the application for leave to appeal out of time made on 21<sup>st</sup> April 2020.

### **ORDERS**

1. Application of the appellant to have the ruling made by this court on 21<sup>st</sup> February 2020 set aside is refused.
2. The appellant is ordered to pay the respondent \$2000.00 as costs of this application.



  
Lyone Seneviratne

**JUDGE**

02<sup>nd</sup> September 2020