

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 104 of 2017

BETWEEN : **RAJNI KANT**

PLAINTIFF

AND: **R. PATEL LAWYERS**

DEFENDANT

Counsel : **Plaintiff: Mr. Rabuka. J**
Defendant: Mr. Sharma. D & Mr Deo. S

Date of Hearing : **31.08.2020**

Date of Judgment : **17.09.2020**

JUDGMENT

INTRODUCTION

1. This is an application seeking leave of the court for extension of time to leave to appeal, and also seeking leave to appeal against Master's decision to strike out the action. Master had struck off the action 30.6.2020 and had ordered the Plaintiff to pay cost. Plaintiff filed this action for liquidated sum of \$43,652.88 and interest on that from 15.10.2013. Plaintiff's action was based on fraudulent conduct and restitution. Plaintiff had also claimed for alleged economic loss for \$3,060,390.00 to his business as a result of the conduct of Defendant. Defendant had filed a fifteen page amended statement of defence where it sought dismissal of the action and cost. In the said statement of defence had also sought damages but there was no counter claim. Plaintiff filed a fifteen page amended reply to the statement of defence. Summons for directions was filed an affidavit verifying lists of the parties were exchanged. Then a summons for strike out of Plaintiff's amended statement of claim was made on 27.3.2018, and action was dismissed. Being aggrieved by said interlocutory judgment Plaintiff erroneously filed a summons for stay of execution and Notice of Appeal. Both of them were dismissed on 29.7.2020 with liberty

to file proper application. As the time for leave to appeal had lapsed by that time present application seeking extension of time was additionally required, and sought.

ANALYSIS

2. The leave to appeal was required to appeal against Master's decision of 30.6.2020 in terms of Court of Appeal decision of In *Goundar v Minister for Health* (unreported civil appeal No. 75 of 2006 delivered on 9.7.2008) where Court of Appeal, stated at paragraph 37 and 38:

"37 This is the position. When proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgments and orders are not interlocutory." (i.e. they are final).

38 Every other application to the High Court should be considered interlocutory"

3. It is undisputed that the Master lacks 'original jurisdiction' to deal this action to make a final orders as stated by Court of Appeal. Hence the ruling delivered on 30.6.2020 was interlocutory.
4. In terms of Order 59 rule 9 (b) of High Court Rules 1988 (HCR), an Appeal, from interlocutory order, is required to be filed within seven days from granting of the leave to appeal.
5. A summons seeking leave to appeal from interlocutory order is required to be filed within fourteen days from the date of order (i.e.30.6.2020) in terms of Order 59 rule 11 of HCR.
6. Plaintiff had erroneously filed a notice of appeal on 13.7.2020 and upon discovery of the error on the very first day of the mention in court withdrew it on 29.7.2020 and filed present application on 7.8.2020.
7. The Order 3 rule 4 of the HCR applies to all the rules as there is no specific rule to grant enlargement of time for leave to appeal. It states as follow;
'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 authorized by these rules, or by any judgment, order or direction, to do any act in any proceeding'. (emphasis added)
8. There is always a balancing act in the exercise of wide discretion of court. The rules needs to be followed and they are created in best interest of the litigants and all the stake holders in the administration of justice.

9. Plaintiff needs to show that discretion of the court must be exercised in favour of extension of time and any relevant fact for such extension can be considered by court without mechanistic approach.(see Southwark London Borough Council v Nejad and others [1999] All ER (D) 36 UK Court of Appeal (Civil Division).
10. Considering present situation and circumstances of the case the delay was not inordinate, and reason for delay was the wrong classification of the dismissal of action through ruling of Master on 30.6.2020, by legal practitioner. As stated earlier Master lacked jurisdiction to determine this action and dismissal was through interlocutory application after exchange of affidavit verifying lists of documents. Mistake of lawyers in the classification had resulted Plaintiff being outside the fourteen day time period to file summons seeking leave, against the ruling.
11. I consider the explanation given for delay is sufficient for the purpose of this application.
12. There is no prejudice to Defendant from the grant of extension for leave to appeal, who are a firm of solicitors. They were aware of Plaintiff's desire to appeal, but procedurally defective application.
13. In my judgment such a defect should not be a reason to refuse extension if there are merits in the application for leave to appeal. This is a factor that needs to be determined in the grant of leave to appeal, but it is a common factor and paramount consideration in joint application for extension of time and also for leave to appeal.
14. Court of Appeal in Lakshman v Estate Management Services Ltd [2015] FJCA 26; ABU14.2012 (27 February 2015) Held

‘[41] Murphy J also mentioned the case of Darrel Lea (Vic.) Pty. Ltd. V Union Assurance Society of Australia Ltd., [1969] Vic Rp 50; [1969] VR 401 where the court relied on William J in Perry v Smith (supra) and held that "It is plain, as William J., said, from the terms of the section that the legislature was expressing an intention in the words used that appeals from interlocutory orders should not be permitted except in special circumstances. If on the facts of any particular case a plain injustice has been done by the making of a wrong order, then undoubtedly the Full Court would intervene and grant leave". The court required in that case for the plaintiff to satisfy two conditions to succeed, that is; "First, that the decision of the learned Judge was wrong and second, that a substantial injustice would be done by allowing the erroneous decision to stand."

15. General principle regarding leave to appeal against interlocutory decision of a judge is state above in Court of Appeal. The threshold is high considering that party seeking leave had also sought enlargement of time.
16. The proposed grounds of appeals are annexed as RK3 for the affidavit in support of this application and there are eight grounds of appeal stated. I need not repeat the same here as all what the Plaintiff is required to show is at least one ground of appeal contains strong arguable appeal ground.
17. In Alpine Bulk Transport Co. Inc v Saudi Eagle Shipping Co. Inc. The Saudi Eagle [1986] 2 Lloyd's Rep. 221 in a setting aside of default judgment held,
 - (a) It is not sufficient to show a merely "arguable" defence that would justify leave to defend under Order 14; it must both have "a real prospect of success" and "carry some degree of conviction".
18. Accordingly, Plaintiff must show grounds which has 'some degree of conviction' which is more than 'arguable' grounds.
19. It should be noted that grounds of appeal needs to be precise without ambiguity. Calanchini P in Nasee Bus Company Ltd v Chand [2013] FJCA 9; ABU40.2011 (8 February 2013) addressed the issue of drafting of appeal grounds, as follows,

'In view of section 23 of the High Court Act Cap 13, the practices referred to above should be followed in this jurisdiction.

(ii) Drafting grounds of appeal

[7]. In their Notice of Appeal, the Appellants have listed ten grounds of appeal. The first three grounds are vague and lacking in sufficient particulars for this Court to determine whether there is any merit. The requirement to particularise grounds of appeal is clearly set out in Rule 15 of the Court of Appeal Rules (the Rules). Every notice is required to specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make. The purpose of the Rule is, in respect of all appeals, to narrow the issues in the appeal, to shorten the hearing and to reduce costs. This can only be achieved if the Appellant states in his notice of appeal the findings of fact and points of law which will be in issue on appeal. Although the notice should state the precise order which the Court of Appeal will be asked to make, this should not result in lengthy or elaborate notices of appeal. Detailed reasoning should not be included.

20. Order 59 rule 14(b) of HCR requires grounds of appeal be stated succinctly. This is essential to find out merits of the appeal.

21. The merits of proposed(Draft) and compliance with above mentioned HCR are as follows

Ground 1

This ground is vague as Plaintiff had not stated with clarity the legal requirements and or principles and precedents allegedly failed to consider by Master

Ground 2

This ground state Master had failed to consider precedent and principles relating to *res judicata*, and this is correct. This was an essential requirement as in paragraph 49 of the Master's ruling, held that Plaintiff it attempting to re-litigate issues already been determined or should have been determined in HBC 16 of 2011. This finding without any analysis and or reference to principles of *res judicata*, is an arguable ground with some conviction.

Ground 3

This is again vague as no specific legal requirement or principle relating to precedents or abuse of process of court was not mentioned. So its merits or demits cannot be decided.

Ground 4

This ground relates to the payment of a sum of \$43,652.88 and Master's finding that Plaintiff was estopped from claiming that when stated in the ruling as,

‘I find that Plaintiff if estopped by the doctrine of *res judicata* in claiming for the sum of \$43,659.88(sic)’

The payment of said sum by Plaintiff through irregular judgment, hence the application of *res judicata* to previous action which was a claim for legal fees of Defendant was not considered. This ground again has ‘real prospect of success’.

Grounds 5 and 6

The ground 5 relates to finding of Master that Plaintiff had abused the process, by re-litigation without seeking them in previous action HBC 11 of 2011. This relates to the issue of abuse of process and *res judicata* which were grounds contained previously hence I do not wish to deal that separately. Ground 6 also relate to *res judicata*.

Ground 7

This relates to the issue of economic loss of the Plaintiff, which is generally not allowed, but Master's ruling had not identified this properly hence proper application of law needs to be discussed before striking out.

Ground 8

This is again vague as precise law or error had not been stated.

22. In my judgment there are strong arguable grounds that can be deduced from draft grounds of appeal submitted. Plaintiff is directed to comply with Order 59 rule 14 of HCR and also decision of Calanchini P in drafting appeal grounds without repetition and being vague. If appeal grounds are repeated and vague as in this case, the purpose is lost.

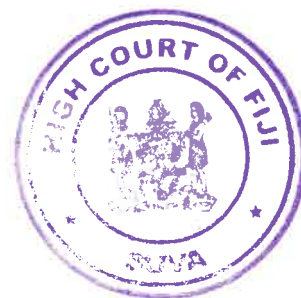
CONCLUSION


23. The delay in this application is about one month and the reason was mistake of lawyer in proper classification of order of Master. There is no prejudice to Defendant through grant of enlargement of time. Defendants are firm of solicitors and the dispute related to recovery of their fees through irregular judgment and issues arising out of that. Master had failed to analyse the facts of the case with principles such as *res judicata*, abuse of process, and damages for economic loss. Application of legal principles without analysis of the facts are grounds for appeal with some conviction. Plaintiff is granted enlargement of time for the application for leave to appeal. Leave to appeal is granted against Master's decision delivered on 30.6.2020. Considering the circumstances of this case parties to bear their costs.

FINAL ORDERS

- a. Plaintiff is granted enlargement of time for the filing of leave to appeal.
- b. Leave to appeal is granted against the Master's decision of 30.6.2020.
- c. No order as to costs.

Dated at Suva this 17th day of September, 2020.




Justice Deepthi Amaratunga
High Court, Suva