

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Case No. HBC 41 of 2020

ON AN APPEAL from the Judgment delivered by the Master on 12 May 2022 in Civil Action No. HBC 41 of 2020

BETWEEN: **NASINU LAND PURCHASE AND HOUSING CO-OPERATIVE SOCIETY LIMITED** a co-operative society duly incorporated pursuant to the Co-operative Societies Ordinance Cap 219 and having its principal place of business at 68 Suva Street, Suva.

APPELLANT (ORIGINAL PLAINTIFF)

AND : **INDAR KISHORE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIRST RESPONDENT
(ORIGINAL FIRST DEFENDANT)**

AND : **SHALEN** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SECOND RESPONDENT
(ORIGINAL SECOND DEFENDANT)**

AND : **MUNI NANDAN** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**THIRD RESPONDENT
(ORIGINAL THIRD DEFENDANT)**

AND : **VIREND** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FOURTH RESPONDENT
(ORIGINAL FOURTH DEFENDANT)**

A N D : EDWARD of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIFTH RESPONDENT
(ORIGINAL FIFTH DEFENDANT)**

A N D : RABE of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SIXTH RESPONDENT
(ORIGINAL SIXTH DEFENDANT)**

A N D : AJINESH KUMAR of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SEVENTH RESPONDENT
(ORIGINAL SEVENTH DEFENDANT)**

A N D : RONIL NALESH KISHORE aka BANDU of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**EIGHTH RESPONDENT
(ORIGINAL EIGHTH DEFENDANT)**

A N D : SUKU of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**NINTH RESPONDENT
(ORIGINAL NINTH DEFENDANT)**

A N D : GOPAL GYANENDRA of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TENTH RESPONDENT
(ORIGINAL TENTH DEFENDANT)**

A N D : **ANISHA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**ELEVENTH RESPONDENT
(ORIGINAL ELEVENTH DEFENDANT)**

A N D : **AMINI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWELFTH RESPONDENT
(ORIGINAL TWELFTH DEFENDANT)**

A N D : **VIKASH** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**THIRTEENTH RESPONDENT
(ORIGINAL THIRTEENTH DEFENDANT)**

A N D : **RITEESH** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FOURTEENTH RESPONDENT
(ORIGINAL FOURTEENTH DEFENDANT)**

A N D : **JENENDRA LAL** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**FIFTEENTH RESPONDENT
(ORIGINAL FIFTEENTH DEFENDANT)**

A N D : **VINE COA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SIXTEENTH RESPONDENT
(ORIGINAL SIXTEENTH DEFENDANT)**

A N D : **FARIDA ALI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**SEVENTEENTH RESPONDENT
(ORIGINAL SEVENTEENTH DEFENDANT)**

A N D : **ISIRELI TAWAKE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**EIGHTEENTH RESPONDENT
(ORIGINAL EIGHTEENTH DEFENDANT)**

A N D : **APETAIA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**NINETEENTH RESPONDENT
(ORIGINAL NINETEENTH DEFENDANT)**

A N D : **SAILASA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTIETH RESPONDENT
(ORIGINAL TWENTIETH DEFENDANT)**

A N D : **BANDU** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FIRST RESPONDENT
(ORIGINAL TWENTY FIRST DEFENDANT)**

A N D : **LIVAI VACALEGA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SECOND RESPONDENT
(ORIGINAL TWENTY SECOND DEFENDANT)**

A N D : **ESAVA DELAI** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY THIRD RESPONDENT
(ORIGINAL TWENTY THIRD DEFENDANT)**

A N D : **EMELE ROKONAWA** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FOURTH RESPONDENT
(ORIGINAL TWENTY FOURTH DEFENDANT)**

A N D : **VERENIKI BATIKALOU** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY FIFTH RESPONDENT
(ORIGINAL TWENTY FIFTH DEFENDANT)**

A N D : **MOSESE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SIXTH RESPONDENT
(ORIGINAL TWENTY SIXTH DEFENDANT)**

A N D : **BOBBY** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY SEVENTH RESPONDENT
(ORIGINAL TWENTY SEVENTH DEFENDANT)**

A N D : **FAIYAZ** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY EIGHTH RESPONDENT
(ORIGINAL TWENTY EIGHTH DEFENDANT)**

A N D : **FILIFE** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**TWENTY NINTH RESPONDENT
(ORIGINAL TWENTY NINTH DEFENDANT)**

A N D : **THE OCCUPIERS** of Certificate of Title No. 44012 being Lot 1 on Deposit Plan No. 11360 in the District of Naitasiri in the Island of Viti Levu in the Fiji Islands situated near Y. M. Haniff Road.

**RESPONDENTS
(ORIGINAL DEFENDANTS)**

Appearance : Ms. Shoma Devan for the appellant
01st, 08th, 09th, 10th, 15th, 25th and 26th respondents are present but unrepresented. All the other respondents are absent and unrepresented.

Hearing : Friday, 01st July 2022 at 9.30 a.m

Decision : Tuesday, 26th July, 2022 at 9.00am

DECISION

[01]. The appellant (original plaintiff) seeks leave to appeal the decision of the Master delivered on 12.05.2022, whereby the Master dismissed the appellant's application for eviction orders against the respondents (original defendants) under Order 113 of the High Court Rules, 1988.

[[02]. The appellant's notice and grounds of appeal was filed on 26.05.2022.

[03]. The appellant filed and served its summons seeking directions on 10.06.2022.

[04]. Order 59, Rule 17 of the High Court Rules, 1988 deals with the procedure after filing of an appeal. Order 59, Rule 17 is in the following terms:

17. (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.*
- (3) *If this rule is not complied with, the appeal is deemed to have been abandoned.*

[05]. In terms of Order 59, Rule 17(1), the appellant is required to file an affidavit of service within seven days upon serving the notice of appeal on the party or parties to the appeal.

[06]. In the case before me, except in the case of Indar Kishore (first respondent), the affidavit of service has been filed within the requisite seven days.

[07]. There has been non-compliance with **Order 59, Rule 17(1)** because the affidavit of service in respect of 1st respondent has been filed late (out by two days)

[08]. In view of this situation, the court made the following preliminary observations:

- *The failure to follow Order 59, Rule 17(1) leads to an automatic abandonment of the appeal and is intended to operate as a deterrence.*
- *In such a situation there is no longer an appeal in existence with no second chance leaving no room for any exercise of discretion or inherent jurisdiction to extend time to file the affidavit of service.*

[09]. In reply, Ms. Devan, counsel for the appellant submitted:

- *The filing of affidavit of service is out by two days. This procedural non-compliance ought not to render the appeal abandoned.*
- *The Rules ought not to be interpreted rigidly so as to deny, justice to a party who is in default of technicalities.*

[10]. Ms. Devan, counsel for the appellant invoked the provisions of **Order 2, Rule 1 (1)** and Order 3, Rule 4 of the High Court Rules, 1988.

[11]. **Order 2, Rule 1(1)** is in the following terms:

1. (1) *Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*

[12]. **Order 3, Rule 4(1)** is in the following terms:

- 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 authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.*

[13]. The attention of the court is drawn to the following decisions:

- (1). *Extreme Business Solutions [Fiji] Ltd v Formscaff Fiji Ltd. Fiji Supreme Court Case No. CBV 0009 of 2018, date of Judgment 26.04.2019.*
- (2). *Balveer Singh v Jagindra Singh aka Jagindar Singh and Radhabai aka Radha Bai, Court of Appeal Case No:- ABU 115 of 2018, Date of Judgment 04.03.2022.*

[14]. In the case of **'Extreme Business Solution Fiji Ltd'** (supra) the notice of appeal had been dismissed by the High Court as the petitioner had failed to serve the notice of appeal within the time stipulated by the court in the court's ruling dated 09.03.2016. The appellant appealed against the said ruling of the High Court Judge to the Court of Appeal. The Court of Appeal referred to the mandatory effect of Order 59, Rule 17(1) of the High Court Rules and held that the High Court Judge had not erred in making the order dismissing the notice of appeal. The appellant sought special leave to appeal to the Supreme Court from the judgment of the Court of Appeal. The Supreme Court held that Order 3, Rule 4(1) confers discretion to extend time where the time has been prescribed by the rules or by any judgment, order or discretion and accordingly granted leave to appeal the judgment of the Court of Appeal.

[15]. Next I turn to the Fiji Court of Appeal decision in **'Balveer Singh'** (supra). This is an appeal from an interlocutory judgment of the High Court in respect of a preliminary objection taken by the defendants- appellants for failure of the plaintiff – respondent to comply with

the provisions of Order 59, Rule 17(2) of the High Court Rules. The High Court judge reinstated the appeal on the basis of the discretionary power of the court under Order 2, Rule 2 of the High Court Rules. In this case, the essence of the matter for determination by the Court of Appeal was that whether an appeal which is 'deemed abandoned' under Order 59, Rule 17(2) can be reinstated by court in terms of the discretion of court in Order 2, Rule 2 and Order 3, Rule 4 of the High Court Rules, 1988. In this case, the respondents' compliance with Rule 17(2) was two days late. The appellant argued that there was in fact, no appeal in place because of non-compliance with Rule 17(2) of Order 59 of the High Court Rules and therefore that was fatal to the maintainability of the appeal. The Court of Appeal considered the elements of discretion in Order 2 and Order 3 of the High Court Rules, 1988 and concluded that the High Court Judge did not err in resorting to Order 2, Rule 1 and Order 3, Rule 4 to restore the appeal. The judgment of the High Court is therefore affirmed and the appeal is accordingly dismissed.

- [16]. Having being guided by the principles and the reasons set out by the Fiji Supreme Court and the Court of Appeal on the above decisions, and in view of the absence of prejudice to the respondents, I grant an extension to the appellant to file its affidavit of service under Order 59, Rule 17(1) on the basis of the discretionary power of the court under Order 2, Rule 1 (2) and order 3, Rule 4 (1) of the High Court Rules, 1988.

ORDERS

- [01]. An extension of time is granted to the appellant to file its affidavit of service under Order 59, Rule 17(1).
- (02) There will be no order as to costs of these proceedings.

 
26.07.2022
Jude Nanayakkara
[Judge]

High Court - Suva
Tuesday, 26th July, 2022