

IN THE HIGH COURT OF FIJI AT SUVA

APPELLATE JURISDICTION

Civil Appeal No. 21 of 2020

Nasinu Magistrate's Court Case No. 137 of 2018

BETWEEN

SATYA NAND t/a SATYA'S PLUMBING WORKS of Nasekula Road,
Labasa.

PLAINTIFF - APPELLANT

AND

FAIR TRADE AUTO LIMITED a Limited Liability Company
having its Registered office at Lot 34, Kalokalo Crescent, Makoi, Nasinu .

DEFENDANT - RESPONDENT

Counsel : Mr. Raikanikoda for Appellant
Ms. A. Lata for Respondent
Date of Hearing : 1st July 2022
Date of Judgment : 28th October 2022

JUDGMENT

[1] The Plaintiff – Appellant [Appellant] instituted these proceedings in the Magistrate’s Court of Nasinu against the Defendant- Respondent [Respondent] seeking following relief for the failure to pay balance of payment for the work carried out for the seven units of the Respondent’s 14 apartments.

- i. \$ 24,800 balance of payment due.
- ii. General Damages and Punitive Damages
- iii. Costs of the action.

[2] The learned Magistrate dismissed the Appellant’s claim and ordered to pay \$39,640 as damages to the Respondent with cost summarily assessed at \$1500. The Appellant lodged this appeal on the following grounds;

1. That the learned Magistrate erred in law and fact for not taking into consideration that there was a breach of the Principal contract in which building materials were always late to the site not by the Appellant but by the Respondent.
2. That the learned Magistrate erred in law and fact and failed to consider that the Appellant was only given (2) two months to complete the 7 units already built by four different contractors who all did not complete the same because building materials were never supplied on time to the site and (8) eight weeks to complete (7) seven units

will be calculated as each unit will be done in (7) seven days which is impossible no matter how fast a contractor could work.

3. That the learned Magistrate erred in law and fact to consider that the Respondent failed to actively and promptly supply the building materials on time to the site which impacted in the delay in completion of the units.
4. That the learned Magistrate erred in law and fact in its calculation of the Assessment of Damages granted in favor of the Respondent and to be paid by the Appellant in which what is owed to the Appellant has been denied any recognition but what is granted to the Respondent are all his expenses for the completion of the work, and the unpaid \$24,800.00 owed to the Appellant has been denied out right by the learned Magistrate which is unethical and bias in its construction and establishment.
5. That the Appellant reserved the right to file further grounds of appeal upon receiving the magistrate's court record.

[3] At the hearing of this appeal Appellant and the Respondent made oral submissions and subsequently filed written submissions.

[4] The Respondent states that the Appellant has failed to comply with Order 37 Rule 1 of the **Magistrate's Court Rules 1945**.

The Rule states "Every appellant shall within 7 days on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his or her intention to appeal, provided that such notice may be given verbally to the court in the presence of the opposite party immediately after the judgment is pronounced.

[5] In Order 37 Rule 3 (1) states;

"The appellant shall within one month from the date of decision appealed from, including the day of such date, file in court below the grounds of his or her appeal, and shall cause a copy of such grounds of appeal to be served on the respondent".

- [6] The Notice of Appeal in this case was filed on 03rd August 2020 at the Nasinu Magistrate's Court for the Judgment delivered on 08th of July 2020. Upon perusal of the Magistrate's Court case record, this Court notes that the delivery of the judgment was in the presence of both counsel for the parties. And the learned Magistrate has correctly informed the parties and noted on the record that they have 7 days to appeal. As required by the rules there was no intention expressed by the Appellant or his counsel verbally, to file an appeal.
- [7] The Appellant should have filed the Notice of Appeal by 15th July 2020. Instead he filed it 26 days later on 03rd August 2020. At the hearing Appellant submitted that the learned Magistrate did not inform the time lines for filing of any appeal therefore they followed a common law approach to file it within 28 days. I am not inclined to agree with either of the positions. As earlier stated the learned Magistrate has clearly noted the 7 day limitation on initiating an appeal. The Appellant had been legally represented by a legal practitioner. Further when the appeal procedure is in written rules, there was no justifiable reason given by the Appellant to deviate from that.
- [8] The Court also notes that the Appellant has not filed Grounds of Appeal as required by Order 37 Rule 3 of the Magistrates Court Rules. Instead the Appellant has taken a hybrid method to include the grounds in the Notice of Appeal.
- [9] The repercussions of failure to comply with Order 37 Rule 3 is in Order 37 Rule 4. The Appellant deemed to have abandoned the appeal. Unless the court below or the appellate court extends the time. However in order to extend time there must be an application before the Court giving reasons for seeking an enlargement of time. There was no such application made before this Court.
- [10] In **Loks Crane and Contractors Ltd v Clutch Systems(Fiji) Ltd**,(HBM 0031 of 1999) the defendant had sought an enlargement of time to file grounds of appeal pursuant to Or 37, r4. His Lordship Gates J (as his lordship then was) held that section 39 provides for the exercise of discretionary powers of the High Court "to entertain any appeal from a Magistrate's Court on any terms which it thinks just". His Lordship declined the

application on a consideration of the following five factors as identified in **AG & Ano vs Paul Praveen Sharma**, (Civil App. no.ABU0041/93S)

- i. The reason for the failure to comply.
- ii. The length of the delay.
- iii. Is there a question which justifies serious consideration?
- iv. If there has been substantial delay, have any of the grounds such merit that they will probably succeed?
- v. The degree of prejudice to the Respondent in enlarging time.

[11] In **Kirpa Nand v Famous Pacific Shipping (NZ)Ltd**, (Civil Appeal no 6 of 2009) it was stated, the rule refers only to extending time for the filing of grounds of appeal and does not deal with extensions for appeals where no notice of intention has been given. It may be that Section 39 of the Magistrate's Court Act, in an appropriate case provides the necessary jurisdiction for this Court to entertain a civil appeal from the Magistrates' Court notwithstanding that no notice of intention to appeal has been given, filed or served.

[12] More recently, His Lordship Kumar J (as his lordship then was) reviewed above authorities in **Jan's Rental Cars (Fiji)Ltd and Prema Nand v Roger Lutz**, (Civil Action HBM 147 of 2014) and concluded as follows;

Section 39 has been used to extend time for filing of Notice of Intention to Appeal and Grounds of Appeal. My view on Section 39 is that it does not give power to Magistrates Court or High Court to extend time for filing of notice of intention to appeal or grounds of appeal but gives the High Court discretion to "entertain any appeal from Magistrates Court, on any terms which it thinks just" when the Appellant has failed to comply with rules of Magistrates Court in relation to civil appeal.

[13] **Order 3 rule 9** of the Magistrates Court Rules provides:

Power to enlarge or abridge time

A court or a judge shall have power to enlarge or abridge the time appointed by the Rules, or fixed by any Order enlarging time, for doing any act or taking any proceedings, such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although **the application** for the same is not made until after the expiration of the time appointed or allowed:

Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction or order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the court or a judge shall otherwise order

(emphasis added)

[14] In this case the Court notes that there has been no application made by the Appellant for enlargement of time to file Notice of Appeal and the Grounds of Appeal. The Court is of the view that Notice of Appeal is the fundamental application that gives High Court the jurisdiction for the whole appeal process. In the absence of any application for enlargement of time to file the Notice of Appeal and the Grounds of Appeal if this Court entertains this appeal, then it would undoubtedly become an abuse of process. The Court would not waive or overlook the requirements of Order 37 Rule 1 and 3 without any reasonable justification in order to use its discretion under section 39 of the Magistrate's Court Act. If so the said Rules which are mandatory on the face of it, would become meaningless.

[15] For the reasons aforementioned the Court makes following orders.

ORDERS

1. The Appeal is dismissed.
2. The Appellant ordered to pay \$1500 [One Thousand Five Hundred Dollars] to the Respondent as cost incurred in this Court within 14 days of this judgment.
3. Registry to dispatch the original case file No: 137 of 2018 with a copy of this judgment to the Nasinu Magistrate's Court forthwith.



Yohan Liyanage

JUDGE

At Suva on 28th October 2022