

**IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION**

CIVIL ACTION NO. HBC 208 OF 2011

BETWEEN : **APIMELEKI KUNAVULA, SAVENACA WAINICAGI, ISAIA GONEWAI (Snr)** all of Korotoga, Sigatoka, self-employed, and **PITA KEWA NACUVA** retired civil servant of Suva, Fiji being the trustees of the Mataqali Naboka

PLAINTIFF

AND : **RUKSHANA BIBI KHAN** of Korotoga, Sigatoka, Businesswoman

DEFENDANT

BEFORE : Hon. Mr. Justice Mohamed Mackie

APPEARANCES : Ms. M. Nabou, for the Plaintiff
Mr. I. Fa (Jnr.), for the Defendant

WRITTEN SUBMISSIONS: By the Plaintiff on 14th April, 2021.
By the Defendant on 22nd November, 2022

HEARING : On 22nd November, 2022.

DATE OF DECISION : 24th February, 2023

RULING

A. INTRODUCTION:

1. Before me is an Application, by way of SUMMONS, preferred by the Plaintiff on 28th January, 2021. The Summons states that it is made under Order 2 Rule 1 and Order 3 Rule 4 of the High Court Rules 1988, (HCR) seeking the following orders.

- A. *That the Plaintiff's appeal be reinstated.*
- B. *If Order A is granted then any required directions and a date for the hearing of the appeal be given.*
- C. *That the plaintiff be granted leave to file an Affidavit of Service of the Notice and Grounds of Appeal out of time.*
- D. *The Costs of this application be costs in the cause.*

2. This Summons is supported by the Affidavit of Emmanuel Kumar, sworn on 27th January, 2021 and filed on 28th January, This Application is opposed by the Defendant by her Affidavit in opposition sworn and filed on 5th March, 2021.
3. Learned Counsel for both the parties, in addition to filing of their respective written submissions, have also made oral submissions at the hearing before me.

B. BACKGROUND:

4. On 24th April, 2014, Hon. Lal Abeygunaratne - J of this Court, as he then was, delivered his Judgment granting the following reliefs to the Plaintiffs:
 - i. Order for the possession of the subject matter Land of the action,
 - ii. Special damages in a sum of \$7,000.00 for arrears of rent,
 - iii. Mesne profit in a sum of \$ 25,800.00 per annum from 1.1.2019 till recovery of possession,
 - iv. General damages & indemnity costs to be assessed by the Master.
5. The Defendant Appealed to the Court of Appeal, which by its judgment dated 27th May, 2016, allowed the Appeal by Setting aside the High Court's Judgment, with costs in a sum of \$1000.00 and making further order for the matter to proceed as a writ action.
6. The Plaintiff Appealed to the Supreme Court, which allowed the Appeal by setting aside the judgment of the Court of Appeal and by reinstating the High Court Judgment, with an order for costs in a total sum of \$8,000.00.
7. The matter was referred back to Lautoka High court, and was pending before the learned Master (the Master) for the assessment of damages and indemnity costs due in terms of the High Court Judgment.
8. The Master, having found that the no steps had been taken to prosecute the matter before him for over a period of 6 months, caused notices to be issued on the parties under Order 25 Rule 9 HCR, and after hearing the parties, by his Ruling dated 5th June, 2020 struck out the whole action for want of prosecution.
9. The Plaintiffs preferred their leave to Appeal Application to the judge of this Court, against the Master's Ruling, and after hearing the counsel for both the parties, my predecessor Judge Hon. A.G. Stuart-J, by his Ruling dated 18th November, 2020 granted, *inter alia*, the following reliefs.
 - a. *Plaintiff is given leave to appeal against the decision of 20.06.2020 (date should be 5.6.2020),*
 - b. *Any appeal must be filed and served within 7 days from the date of this decision.*
 - c. *There is no order as to costs,*
 - d. *The proceedings are adjourned for mention to 24.11.2020 at 10.30 am to enable the Plaintiff to file and serve its appeal as set out in (i) above.*

10. Pursuant to the leave granted, the Plaintiffs on 23rd November, 2020 filed their NOTICE OF APPEAL AND GROUNDS OF APPEAL. However, no Affidavit of service was filed within 7 days of such service as prescribed by Order 59 Rule 17 (1) of the HCR.
11. The Plaintiff also, within 21 days of filing of Notice of Appeal, **failed** to file and serve a Summons returnable before a judge for directions and a date for hearing of the appeal as contemplated under Order 59 Rule 17 (2) of the High Court Rule.
12. Accordingly, due to the Plaintiffs' failure to adhere to the Rule 17 (1) and (2) under Order 59 of the HCR, the Rule 17 (3) thereof has become operative and the Plaintiffs' Appeal is now deemed to have been abandoned. It is under this backdrop, the Plaintiffs filed the Summons in hand moving for reliefs, *inter alia*, to have the Appeal reinstated.

C. LAW & DISCUSSION:

13. I will now deal with the Application of the Plaintiffs to have the Appeal, which is deemed to have been abandoned, reinstated.
14. The plaintiffs, after their laborious prosecution that commenced in the year 2011, finally became victorious by the judgment dated 21st July, 2017 pronounced by the Supreme Court. Accordingly, the matter being referred back to the High Court, was pending before the Master for the assessment of Damages and Indemnity Costs. Unfortunately, it was struck out for want of prosecution pursuant to Order 25 Rule 09 of the HCR, which I would say a '*Slip between the Cup and Lip*' for the Plaintiffs.
15. The grounds of Appeal relied on by the Plaintiffs are as follows;
 1. *The learned Master erred in striking out the cause for want of prosecution and abuse of process of the Court.*
 2. *The learned Master erred by not complying with the Orders of the Judge of the High court entered on 24th april,2024 and the Supreme Court entered on 21st July,2017 , by assessing the indemnity costs of the Plaintiffs. (Plaintiffs had relinquished their claim for damages)*
 3. *The learned Master erred by failing to consider that Order 25 Rule 9 did not apply as final judgment had been entered in the matter on 24th April, 2014 and affirmed by the Supreme Court on 21st July, 2017.*
 4. *The learned Master erred in law by interpreting the Order 25 Rule 9 imposes a rebuttal onus on the Plaintiff.*
16. Order 59 rule 17 of the High Court Rules 1988 provides:
 - (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 the 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.*

17. The Plaintiffs, upon serving the Notice of Appeal on the Defendants, failed to file an Affidavit of service within 7 days of such service as required by Order 59 Rule 17 (1).
18. The Plaintiff also failed, within 21 days of the filing of the Notice of Appeal, to file and serve a Summons returnable before a judge for directions and a date for hearing of the Appeal as per Rule 17 (3) of Order 59 of the HCR.
19. The explanation offered by the Plaintiffs' Solicitors through paragraph 8 of the Affidavit in support by Emmanuel Kumar, a Staff solicitor, was that ***"Due to an oversight on my part, I did not file and serve a summons pursuant to order 59 rule 17 of the High court Rules. The Rules State that if the said Summons is not filed within 21 days of filing of the Notice of Appeal then the appeal is deemed abandoned. This was purely an inadvertent error and no disrespect was intended to the Court"*** (emphasis mine)
20. However, the issue for determination is whether the Court has power to reinstate an Appeal which is deemed to have been abandoned under Order 59 Rule 17 (3) of the HCR1988. In my view once an appeal is abandoned there is no Appeal on foot to reinstate.
21. I am mindful of the decisions of Mohamed Ajmeer –J in the following matters, wherein the Applications for reinstatement of the Appeal, which is deemed to have been abandoned, were favorably considered.

Sarojini v Native Land Trust Board [2016] FJHC 1018; HBC230.2000 4 November 2016) and Radhabai v Singh [2018] FJHC 779; HBC172.2015 (20 August 2018)

In arriving at his decision to reinstate an Appeal, which is deemed to have been abandoned, Justice Ajmeer had relied on some Australian decisions where such reinstatements have been allowed.

In ***Sarojini v Native Land Trust Board (supra)*** he had relied on the decision in ***Bele & Vaughan (No. 2) [2012] Fam CAFC 125 (21 August 2012)***. It appears from the decision in the said case the Australian Court has gone on the basis that the court has discretion to reinstate an appeal which is deemed to have been abandoned.

22. High Court Rules 1988 does not confer discretionary power on the court to reinstate Appeals which are deemed to have been abandoned. There are instances where the legislature has provided for extension of time when a party fails to do an act within the period prescribed by a statute. The legislature in this instance in its own wisdom has thought that it is not proper or necessary to make provisions allowing an Appellant who fails to comply with Order 59 rule 17 of the HCR1988, to make an Application for the reinstatement of an Appeal, which is deemed to have been abandoned.
23. The court cannot introduce new provisions of law to statutes and also the court cannot confer powers which are not provided for by the statute on it. That is the duty of the

legislature. If there was provision for the reinstatement of Appeals which is deemed to have been abandoned, the court can always be guided by the previous decisions in the exercise of its discretionary power.

24. In **Vermande v Daveta [2019] FJHC 371; Civil Action 3 of 2018 (24 April 2019)** Justice Seneviratne, for the reasons given in his Judgment did not follow the aforesaid decisions of Justice Mohamed Ajmeer. I am inclined to follow Justice Seneviratne in this regard.

25. Learned Counsel for the Defendant has drawn my attention to the following decided authorities, which fortify my decision here.

a. In the matter of **Gay and Beall v Resolution Trust Corporation and others [2010] FJHC 268; HBA 01.2009 (26.Frbruary,2010)** the Court stated that;

"The Rules in part ii of Order 59 have imposed a strict timetable for filing and serving documents at the Registry and on the respondents. The purpose of the Rules was obviously to avoid delay at the interlocutory stages and to make such appeals more efficient. The provision in rule 17 (3) and the failure to follow Rules 17 (1) and 17 (2) leads to an automatic abandonment of the appeal of and is intended to operate as a deterrence in respect of delay"

b. In the matter of **Ports Authority of Fiji v C & T Marketing Limited [2010]] FJCA 1 ; ABU 0004,2001S (22 February,2010)** , the Court stated that;

"the failure to follow rules resulted in the dismissal of a notice of appeal filed in the Court of Appeal. 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 special circumstances"

c. In the matter of **Diana Glesbrecht v Cross [2012] FJHC 1219; HBA 31 .2011 (17.july 2012)**, the Court stated the following.

"15. It is submitted by the defendants Appellants (para 10 of the Affidavit), the summons was not filed owing to an oversight. Merely stating that it was an oversight won't justify the delay and I hold the Defendants Appellants failed to substantiate the claim of oversight. in this regard , I quote the decision of Justice Calanchini in the case of **A Mithcell Gay and Allan C Beall v Resolution Trust Corporation , the Cadle Company , Lellani Bortels and Lynel Bortels [2010] HBA 1/095 (Apf) HBC 458/93. (Order 59 Rule 17(1) (2) and (3):**

"Application for Leave must be filed within 14 days of the delivery of an Order or Judgment. By imposing strict timetable the Rules avoid delay at the interlocutory stage of civil proceedings and to make such appeals more efficient. Rule 17 (3) leads to an automatic abandonment rule that failure to follow rule 17 (1) and 17(2) leads to an automatic abandonment of an appeal is intended to operate as a deterrence . Appeal 11 days out of time, without application to enlarge time, or timely filing of summons for directions, and absent explanation

for non-compliance with rules is deemed abandoned. Leave to appeal is dismissed with costs”

26. The case authority alluded to by the learned Counsel for the Plaintiff in ***Musket Cove Resort Limited V Yeates*** for which the correct reference is **HBC 159/2018**, in my view will not assist me in this decision. The failure of the defendant in that matter was prior to granting leave to appeal. The failure of the Plaintiff hereof is after granting leave. However, the decision of the Court in relation to Order 59 Rules 17 (1) (2) and (3) in ***Musket Cove*** (Supra) is still pending.

D. CONCLUSION:

27. I am therefore of the view that the court has no power to reinstate an Appeal which is deemed to have been abandoned. The Plaintiffs hereof, who abandon their Appeal, are not without a remedy. If the Appeal is deemed to have been abandoned under order 59 Rule 17 (3) of the HCR 1988, the Plaintiffs, if they so wish, can make an Application for extension of time.

E. FINAL ORDERS:

28. This Court accordingly, makes the following orders:

- a. The Application of the Plaintiffs for the reinstatement of the Appeal, which is deemed to have been abandoned, is refused.
- b. Considering the circumstances, no order for costs made and the parties shall bear their own costs.



A.M. Mohamed Mackie
Judge

At High Court Lautoka this 24th day of February, 2023.

SOLICITORS:

For the Plaintiff: Parshotam Lawyers
For the Defendant: Fa & Company