

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

**Appeal Action No. HBA 08 of 2020**

**IN THE MATTER** of Civil Action No. 67  
of 2019 on Appeal of the Order made by  
the Resident Magistrate Ms. George on  
15<sup>th</sup> day of April 2019.

**BETWEEN:**                    **CITY MAINTENANCE & PLUMBING SERVICES** Lot 4 Sese Street,  
Suva.

**APPLICANT**

**(Original Defendant)**

**AND:**                         **MAHENDRA KUMAR** (fathers name Basns Karan) Lot 3, 15 Ratu Sukuna  
Road, Suva, Fiji.

**RESPONDENT**

**(Original Plaintiff)**

**BEFORE:**                    **Hon. Mr Justice Vishwa Datt Sharma**

**COUNSEL:**                **Mr. Kumar Y.** for the Applicant  
**Ms. Tosokiwaii V.** for the Respondent

**Date of Judgment:**    **23<sup>rd</sup> May, 2024 @ 9.30am**

**JUDGMENT**

**[Summons for Leave to Appeal out of Time filed on 17<sup>th</sup> June 2020]**

## **Introduction**

1. The Applicant [Original Defendant] filed a Summons on 17<sup>th</sup> June 2020 and sought for the following Orders:
  - (1) The Appellant/Defendant be given leave to Appeal the decision delivered by Chief Magistrate Ms. George on 15<sup>th</sup> April 2019.
  - (2) The Appellant/Defendant be given Leave to Appeal out of time the decision of the Chief Magistrate Ms. George dated on 15<sup>th</sup> Day of April 2019 wherein she made the following orders:-
    - (i) That the Defendant's Summons seeking the Striking Out of the Respondent/Plaintiff's Writ of Summons and the Statement of Claim hereby succeeds.
    - (ii) The Respondent/Plaintiff Writ of Summons and the Statement of Claim is accordingly struck out as the Respondent/Plaintiff claim lacks basic materials and particulars of the Claim.
    - (iii) That the Default Judgment entered against the Appellant/Defendant and the Writ of Fiefa be stayed until the determination of the pending appeal.
    - (iv) That the cost of this application be cost in cause.
2. The application was made in support of the Affidavit deposed by Ronish Sami.
3. The Respondent/Plaintiff opposed the Applicant/Defendant's Summons and filed an Affidavit in Opposition on 27<sup>th</sup> March 2024.

## **The proceedings in the Magistrate's Court**

4. The Plaintiff instituted Magistrates Court Civil Action No. 67 of 2019 claiming that the Defendant owed the Plaintiff a total sum of money of \$28,757.25 for breach of contract.
5. The Statement of Claim was filed on 15<sup>th</sup> March 2019 and served on to the Defendant on 18<sup>th</sup> March 2019.
6. The Summons was returnable on 15<sup>th</sup> April 2019 for the Defendant to answer the suit by the Plaintiff.
7. On 15<sup>th</sup> April 2019, the case was called and Mr. Bale appeared for the Plaintiff. However, the Defendant gave no appearance and hence was absent.
8. Mr. Bale informed Court that the Defendant was served with the Plaintiff's Writ and an Affidavit of Service filed in Court and therefore moved for Default Judgment be entered for the liquidated sum of \$28,757.25 against the Defendant.
9. On 25<sup>th</sup> April 2019, the Defendant through its solicitors Sairav Law filed a Notice of Motion

seeking for the Default Judgment entered against the Defendant be set aside and be granted Leave to Defend the case on the grounds that a Counsel appeared from Sairav Law and was informed that default judgment has already been entered against the Defendant.

10. The presiding Chief Magistrate heard the Defendant's application for setting aside the Default Judgment and determined that the Application be dismissed; and Judgment by default entered/ or granted on 15<sup>th</sup> April 2019 is allowed with parties to bear their own costs of the setting aside application.

#### **Appellants Contention.**

11. Filed Written Submission.
12. The application is made pursuant to Order 59 Rule 8 and also relied on Order 59 Rule 10 of the High Court Rules 1988.
13. The Defendant decided to Appeal the decision delivered on 15<sup>th</sup> April 2019 and filed an application to Appeal out of time on 17<sup>th</sup> June, 2020, some 1 year 2 months after the delivery of the Decision.
14. The Defendant has a Counter-claim and has a meritorious claim before this Court:
15. Ignorant of Law that no statement of Defence was filed.
16. Admits delay in filing this Summons for Leave to Appeal out of time. Cited Order 3 rule 4 (2) (1) for Enlargement of time.

#### **Respondent's Case**

17. Filed written submissions.
18. Length of Delay: 3 Summons filed before this Court, all withdrawn except summons filed on 17<sup>th</sup> June, 2020.
19. Paragraph 12 and 13 of affidavit refers - no medical certificate filed: Respondent informed by Counsel to sign an affidavit and told Counsel he was in New Zealand for medical issues.
20. The presiding Chief Magistrate delivered its ruling on 15<sup>th</sup> April 2019.
21. Paragraph 17 talk about laxity of his lawyer, Sairav Law and his inactions.
22. Sought to Strike out the application for Leave to appeal out to time.

#### **Determination**

23. This is the Appellant's [Original Defendants] Summons of 17<sup>th</sup> June 2020 seeking Leave to Appeal out of time the Decision delivered by the presiding Chief Magistrate of 15<sup>th</sup> April 2019.

24. Therefore, this is an appeal of a presiding Chief Magistrate from the Magistrates Court to the High Court.
25. The Appellant has filed his application pursuant to **Order 59 Rule 8 (1), 8 (2) Rule 10 (1) and (2) of the High Court Rules 1988 and the Inherent Jurisdiction** of the High Court. The Appellants written and oral submissions also labours on the above-mentioned quoted High Court Rules 1988.
26. **Order 59 Rule 8 and Rule 10** deals with
  - (i) Rule 8 - An appeal from the Master's Decision (rr59, r.8) and
  - (ii) Rule 10 - Extension of time (rr59, r10).
27. This Particular Appeal which is before the High Court at no time was heard and/or determined by the Master of the High Court.
28. The Appellant/Defendant ought to have filed their Summons for Leave to Appeal the Decision of the presiding Chief Magistrate pursuant to **Order 36 of the Magistrates Court Act 1944** which exactly deals with Civil Appeal as paraphrased hereunder:

**"PART V-APPEALS**

*Appeals in Civil Cases [MC36]*

*Civil appeals*

36.-(1) Subject to the provisions of this Act, an appeal shall lie to the Supreme Court from a resident magistrate in the following cases:-

- (a) from all final judgments and decisions; and
- (b) from all interlocutory orders and decisions made in the course of any suit or matter before a magistrates' court."

29. Order 37 (1) of the Magistrate Court Rules 1945 deals with the Notice of Intention to Appeal and provides:

"1. Every Appellant shall within 7 days after the day 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 judgment is pronounced.

Whilst Order 37 (3) (1) Deals with grounds of Appeal and provides as hereunder;

*Grounds of Appeal*

3. (1) The Appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the 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.

30. The need for the importance of complying with the set Rules was emphasized in the case of **Kenneth John Hart v Air Pacific Ltd**, Civil Appeal No. 23 of 1983.
31. In the case of **Native Land Trust Board v Kaur** [1997] FJCA 44, the Court of Appeal adopted the principle espoused in the Case of **Venkatamma v Ferrier Watson**, Civil Appeal No. CBV0002 of 1992 at page 3 that -

'We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal: in cases not having the special combination of the features present here, it is unlikely to be excused'

32. In terms of the Appellant/original Defendant's submissions, he raised the provisions of Order 3 Rule 4 (2) (1) of the High Court Rules for extension of time to file the appeal/grounds.
33. In light of above submissions, I make reference to the case of **Ministry of Health v Nacanieli** [2010] FJMC 41, The Court adopted the principle highlighted in the case of **Ali v Ilaitia Boila and Chirk Yam, Fiji Development Bank of Fiji**, Civil Appeal No. ABU 0030 of 2002 where the Court held:

*"The power to extend the time for appeal is discretionary and has to be exercised judicially having regard to established principles.... The onus is on the Appellants to satisfy the Court, that in the circumstances, justice of the case requires that they be given the opportunity to attack the Order... **the following factors are normally taken into account in deciding whether to grant an extension of time;***

- (i) *The length of delay*
- (ii) *The reasons for delay*
- (iii) *The degree of prejudice to the Respondent if the application is granted, and*
- (iv) *The prospect of the intended appeal succeeding if application is granted."*

**(i) Length of delay**

- Appellant's Summons for Leave to Appeal it of time was filed on 17<sup>th</sup> June 2020. The Ruling was delivered on 23<sup>rd</sup> January 2020, some after 5 months' time period.
- However, the Appellants filed 2 subsequent application seeking for leave for Appeal on 01<sup>st</sup> October, 2020 and 12<sup>th</sup> January, 2022.
- Only after multiple delays by the Appellant that he decided to withdrawn all subsection application and proceed with the Initial application for Leave to Appeal out of time on 12<sup>th</sup> March, 2024 accordingly.

**(ii) Reasons for delay**

- Judgment be default was entered against the Appellant/Original Defendant on 15<sup>th</sup> April, 2019.
- The Appellant then filed an application seeking for Setting Aside of the default Judgment entered against the Appellant/Original Defendant.
- At paragraph 12 and 13 of the Appellant/Original Defendant stated that he was away overseas on medical treatment but did not provide any medical certificate to the Court.

- The Appellant /Defendant blames his former counsel, Sairav Law respectively failed to appear on the returnable date of the summons.
- The Appellant/ Defendant in his written submissions at paragraph 5.21 states that the reason for the delay in making that the reason was the laxity of previous lawyers. He said he was ignorant of the law.

**(iii) Degree of prejudice.**

- The Appellant/ Defendant in his affidavit stated at paragraph 17 that he was prejudiced due to the inaction and the laxity of his former solicitors and costs.
- However, this is contradicted by which he stated at paragraph 12 of his affidavit in support deposed on 16<sup>th</sup> of June, 2020.

**(iv) Prospect of Appeal Succeeding**

- Appellant/ Defendant submitted he had a good chance of succeeding at the Appeal
- The presiding Magistrate whilst delivering her ruling on 23<sup>rd</sup> January 2020 clearly stated and found that the Appellants/ Defendant's affidavit in support of the setting aside application did not have any merits and/or defence and dismissed the application with Default Judgment entered against the Defendant on 15<sup>th</sup> April 2019 remained intact.

**In Conclusion**

34. Judgment by default was entered against the Appellant/Original Defendant on 15<sup>th</sup> April 2019 for a liquidated sum of \$28,757.25.
35. On 25<sup>th</sup> April 2019, the Appellant/ Original Defendant sought for the setting aside of the default judgment entered against him.
36. The application for setting aside default judgment was heard and dismissed on 23<sup>rd</sup> January 2020 citing reasons that:
  - (i) On 15<sup>th</sup> April 2019 neither the Appellant/Original Defendant nor his counsel was present, hence Default Judgment was entered against the Appellant/ Original Defendant.
  - (ii) The Affidavit in Support seeking for Setting Aside of Default Judgment was not deposed on merits nor the facts was showing that the Appellant/original Defendant has a defence on merits. Further, no proposed statement of Defence was annexed to the affidavit to show what his defence was.
  - (iii) The Appellant/original defendant has not shown sufficient cause as contemplated in order 30 rule 5 of the Magistrates Court Rules seeking to Set Aside Default Judgment. The presiding Chief Magistrate was also not satisfied with the Affidavit in Support of Setting Aside Default Judgment.

- (iv) Summons for Leave to Appeal and Leave to Appeal out of time was filed on 17<sup>th</sup> June 2020 after the Decision on the application for Setting Aside Default Judgment was delivered on 23<sup>rd</sup> January 2020, some 5 months later.
- (v) I find that the Decision by the Appellant/ Original Defendant to seek Leave to Appeal out of time was rather made too late in the day [5 months] and counsel unreasonable delay tentamounting to inordinate delay.
- (vi) Such delay amounted to an abuse of Court process since the statutory time limit for consideration of 'An appeal' in such cases is exceeded accordingly.
- (vii) For the reason hereinabove which I have endeavored to give prompts me with no other alternative, but proceed to dismiss the Appellant/Original Defendant's application seeking for Leave to Appeal out of time.

#### **Costs**

37. The application proceeded to full hearing with written submission filed. It is only just and fair that I order a summarily assessed costs of \$2,500 against the Appellant/Original Defendant, City Maintenance & Plumbing Services to be paid to the Respondent/ Original Plaintiff, Mahendra Kumar.

#### **Orders**

- (i) The Appellant/ Original Defendant's application seeking for Leave to Appeal out of time is dismissed in its entirety.
- (ii) The Appellant/Original Defendant is ordered to pay the Respondent/Original Plaintiff a sum of \$2,500 as summarily assessed costs within 14 days timeframe.
- (iii) Orders accordingly.

**Dated at Suva this 23<sup>rd</sup> day of May, 2024.**



**VISHWA DATT SHARMA  
PUISNE JUDGE**

**Cc: JITEN REDDY LAWYERS, NAKASI  
VOSOROGO LAWYERS, SUVA**