

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal HBA 06 of 2024

IN THE MATTER of Civil Action No 05
of 2023 on Appeal of the Ruling of
Resident Magistrate Mr. Charles
Ratakele, on 23rd day of February 2024.

BETWEEN : **JITENDRA SINGH**

APPLICANT
(Original Defendant)

AND : **SEAN KAMALI**

DEFENDANT
(Original Plaintiff)

Appearances : S. Gosaiy for the Applicant
V. Kumar for the Defendant

Date of Hearing : 28th August 2024

Date of Ruling : 29th August 2024

EX TEMPORE RULING

(Summons for Leave to Appeal Out of Time)

A. Introduction

1. A Summons was filed by the Applicant on 8th April 2024 seeking leave to appeal, out of time, the ruling of Resident Magistrate Charles Ratakele on 23rd February 2024.
2. The Summons was filed pursuant to Order 55 of the *High Court* Rules 1988 and the inherent jurisdiction of the Court.

B. Preliminary Issue

3. A preliminary issue was raised by the Respondent that the Summons and the Affidavit filed in Support, were irregular and did not comply with the mandatory requirement of Order 37 of the *Magistrates Court* Rules [Cap 14], and ought therefore be struck off.

C. Background

4. This was an old proceeding initiated in the Magistrates Court, as JDS No 05 of 2013, on 30th January 2023. It involved the sale of a taxi and its permit by the Applicant to the Respondent. The sale was governed by an oral agreement however there was a difficulty in performance, because the vehicle required extensive repair and had outstanding amounts owed on it. The agreement was varied to allow the Respondent to attend to the repairs and to take over payment of monies owed on the vehicle, in return for the Applicant leasing the vehicle and paying the Respondent a fixed fee. The Respondent did not pay the Applicant income or fees and rather hired another driver for the taxi. Consequently, the Applicant took back his taxi, effectively reclaiming ownership.
5. In the Magistrates Court, the Respondent sought re-imbusement of all his expenses, totaling an amount of \$8,870.64 and sought to enforce the agreement for lease and payment. The Applicant denies owing the amount. Judgment in default of appearance was entered against the Applicant on 16th March 2015. The

default judgement was set aside on 21st December 2022 and a hearing of the matter was held in the Court below, on 23rd February 2024, with the Applicant being found liable to reimburse the Respondent the sum of \$8, 919.39, with costs summarily assessed at \$3,000.

D. Order XXXVII Civil Appeals

6. **Orders 37 Parts I – VI of the *Magistrates Court Act*** mandates the process for civil appeals to the High Court, against decisions of a Magistrate. Orders 37(1), (3)-(1) and (4) are relevant, for the purpose of this ruling;

I. Notice of Intention to Appeal

1. *Every appellant shall within seven 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 intention to appeal.*

III. 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 appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.*

4. *Effect of failure to file grounds of appeal*

On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.

7. The peculiar feature of the filing of civil appeals against decisions of the magistrate’s court, are that the **Notice of Intention to Appeal** and the **Grounds of Appeal** have to be filed, initially, in the Magistrates Court, as mandated by Orders 37(1) and 3(1). The Notice of Intention to Appeal needs to be filed in “the court below” because the court has to, in the exercise of its discretion, determine,

at that stage, the security to be paid by the Appellant, either by deposit or bond,¹ to cover the payment of costs, that may be awarded to any respondent by the appellate court. The Grounds of Appeal have to be filed in the Magistrates Court because it is mandatory, at that stage, that the Appellant deposit with the clerk of the court below, such sum as the clerk shall consider sufficient to cover the fees prescribed for the preparation, certification and copying of the record.²

8. In this instance, the Applicant has neither filed a Notice of Intention to Appeal nor Grounds of Appeal, as mandated by Orders 37-(1) and 37(3)-(1), respectively. Non-compliance with these Orders have not been ameliorated in any way, either by seeking the notice of intention to appeal, verbally, as allowed under Order 37(1) or by seeking leave of this Court to enlarge time under Order 37(4), to file the Grounds of Appeal.
9. The Applicant has proceeded directly to file the appeal in the High Court pursuant to Order 55 of the *High Court Rules* 1988 and the inherent jurisdiction of the Court, against the decision of the Magistrate delivered on 23rd February 2024, without reference to Orders 37(1) and (4) of the Magistrate Court Rules.

E. Analysis

10. The Court notes that the requirement that the Appellant file a Notice of Intention to Appeal, is mandatory and there is little room for the Court to exercise its discretion or to ameliorate this requirement, other than in the limited circumstance provided by Order 37-(1), as affirmed by the Court of Appeal in *Simon Seru v Credit Corporation Ltd* –Civil Appeal No ABU 0115 of 2016;

“As is obvious from the wording of the rule, the requirement is mandatory in nature. It is imperative that the notice of intention to appeal be given within 7 days, albeit a verbal notice suffices provided it is given immediately after the judgement is pronounced. Therefore the emphasis is not so much on the form of the notice but on the time limit of 7 days. In certain instances, counsel resort to make applications moving for the indulgence of the exercise of discretion. When the rules are mandatory, a court is debarred from using such discretion”

¹ Rule 37(2)(1)

² Rule 37(3)(2)

11. As the requirement to file a Notice of Intention to Appeal, pursuant to Order 37-(1) is mandatory, the Court finds that non-compliance with this requirement must mean that no appeal subsists, nor can it be substituted by a Summons for Leave to Appeal Out of Time.³ There is no provision in the *High Court Rules 1988* or in the Magistrates Court Act or Rules that allows an application for leave to appeal out of time, from the decision of the Magistrate, to be filed in substitute of a Notice of Intention to Appeal, mandated by Order 37(1) of the *Magistrates Court Rules* [Cap 14].⁴
12. The finding of the Court is sufficient to dispose of this matter, other than to point out that Order 37(3)-(1) governing the filing of the grounds of appeal “in the court below” was also not complied with. It is unnecessary to consider the consequence of non-compliance with this Rule, given the Court’s primary finding on the failure to file a Notice of Intention to Appeal.

Finding:

- (i) **The Summons for Leave to Appeal Out of Time filed by the Applicant pursuant to Order 55 of the High Court Rules 1988 on 8th April 2024 is dismissed.**
- (ii) **Costs is summarily assessed at \$1,000 to be paid within 21 days.**



Savenaca Banuve
Savenaca Banuve
Judge

At Suva
29th August 2024

³ **Auto World Trading (Fiji) Ltd v Raidruta** [2017] FJHC 251(Amaratunga, J) as followed in **Nileshwari Bandana v Singh** –Civil Appeal No HBA 27 of 2020 (Brito-Mutunayagam, j).

⁴ [2017]FJHC 251.