

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No 05 of 2023

(On appeal of the Order made by the Suva Magistrates Court on the 25th of October 2023 in Civil Action No 236 of 2018)

BETWEEN : **PERMAL CONSTRUCTION PTE LTD** formerly Permal Construction Ltd of Lot 1 Lalita Bhindi Street, Bhindi Subdivision, Vatuwaqa Industrial, Suva, Company No 8773.

ORIGINAL DEFENDANT/APPELLANT

AND : **RAKESH KUMAR** trading as **DAYA RAM & KUMAR'S EARTH WORKS** of Valelevu, Nasinu and Wailoku Rd, Tamavua

ORIGINAL PLAINTIFF/RESPONDENT

BEFORE : **Banuve, J**

Appearances : V.Kumar for the Original Plaintiff/Respondent

Date of Hearing : 17th September 2024

Date of Ruling : 20th September 2024

RULING

A. Introduction

1. A Summons was filed by the Original Defendant/Applicant on 28th November 2023, seeking;
 - (i) That leave be granted to the Defendant to file Notice of Appeal and Grounds of Appeal Out of Time against the interlocutory ruling of the Resident Magistrate Mr Jeremiah Savou of 25th October 2023 in Civil Action No 236 of 2018, whereby costs of \$1500.00 was awarded to the Respondent.
 - (ii) That time be extended to allow the Applicant to file its Notice of Intention to Appeal and Grounds of Appeal against the decision of the Learned Magistrate, Mr Jeremiah Savou of 25th October 2023.
 - (iii) That an order be made in terms of the execution of the Order of 25th October 2023 that it be stayed until the determination of the application therein.
 - (iv) That costs be in the cause.
2. The Summons was filed pursuant to Order 55, Rules 1 & 3 of the *High Court* Rules 1988 and Order 2, Rule 2 of the *Magistrates Court* Rules [Cap 14].

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 XXXVII-CIVIL APPEALS** of the *Magistrates Court* Rules [Cap 14], and therefore ought to be dismissed.

C. Background

4. This is an interlocutory appeal which arose out of the decision of the said Magistrate to accede to an application to vacate a hearing scheduled for 2 days to commence on 25th October 2023, on the payment of costs of \$1,500.00, within 21

days, to the Respondent, given that no application to stay the proceeding had been filed beforehand.

5. The Applicant's grievances and the subject of the interlocutory appeal are;
 - (i) the decision of the Magistrate to direct the payment of costs of \$1,500.00 to the Respondent, within 21 days, for acceding to the late request for adjournment by the Applicant;
 - (ii) the subsistence of an appeal (HBA 08 of 2022) in a related matter although the Court is not assisted by the paucity of the material provided by the Applicant in understanding the relevance, if any, of that appeal.

D. Order XXXVII CIVIL APPEALS

6. Order 37 of the *Magistrates Court Rules* [Cap 14] mandates the process governing civil appeals from the Magistrates Court to the High Court. Orders 37(1),(3) and (4), are relevant

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. As prescribed in the aforesaid Rules, appeals to the High Court from rulings of the Magistrates Court are initiated by filing a **Notice of Intention to Appeal** and the Grounds of Appeal in the “**court below**” for reasons provided in Rule 37(2)(1) (*determination of security of costs*) and Rule 37(3)(2) (*deposit to cover the fees for the preparation, certification and copying of the Court Record*).
8. In this instance, the Applicant has neither filed a Notice of Intention to Appeal nor Grounds of Appeal in the “court below” as prescribed by Order 37 of the *Magistrates Court Rules* [Cap 14], but has proceeded to file the Summons for Leave to file Notice of Intention to appeal and Grounds of Appeal Out of Time in the High Court on 28th November 2023.
9. The Applicant did not turn up in Court on the 17th of September 2024, the date set for the hearing of its Summons and no explanation was provided for its absence.

E. Analysis

10. The requirement for filing a Notice of Intention to Appeal prescribed by Order 37(1) of the *Magistrates Court Rules* is mandatory, 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 wordings 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 judgment 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”*

11. The parts highlighted in the extract from the Court of Appeal ruling affirm the objective behind the filing of the Notice of the Intention to Appeal in “the court below” is to ensure that “a time limit of 7 days” is complied with for which the

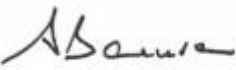
notice of intention to appeal is to be given to the Respondent, and to the “court below”.

12. This requirement has not been complied with and this default cannot be cured by filing the Summons for Leave to file a Notice of Intention to Appeal in the High Court by the Applicant on 28th November 2023, instead.
13. Whilst not necessary for the determination of this matter, it would be remiss of the Court not to query the merit of seeking leave to file an interlocutory appeal against the award of costs *only* by the Magistrate.
Order XXXIII of the Magistrates Court Rules [Cap 14] gives the Court a general discretion to award costs which it can summarily determine, and in this instance, it was exercised because of a late application to vacate a hearing without notification on the day it was set to commence, without formal notification beforehand¹. Had it been necessary, the Court would have found no basis for interfering with the decision to award costs.

Finding:

- (1) **The Summons for Leave to File Notice of Intention to Appeal and Grounds of Appeal Out of Time filed on 28th November 2023 is dismissed.**
- (2) **Costs is summarily assessed at \$500.00 to be paid to the Original Plaintiff/Respondent and \$500 to be paid to the High Court within 21 days of this ruling.**




Savenaca Banuve
Judge

**At Suva
20th September, 2024.**

¹ Order XXX111 as discussed in *Sun Insurance Company Ltd v Faiyaz Khan* –Case No HBA 001 OF 2011