

6. In or around November 2010, Sharma, acting in his capacity as trustee, entered into an oral tenancy agreement with the Appellant, Dr. Isireli Biumaitotoya ("**Isireli**", the defendant below). Under the terms of this agreement, Isireli was granted possession of a designated flat on Lot 30 for residential purposes at a monthly rental of \$650, together with a separate portion of the building for use as a medical practice at a monthly rental of \$1,000.
7. Isireli complied with the agreed monthly rental payments.
8. However, in or around March 2011, Isireli ceased payments to Sharma and began to remit rental payments directly to Ms. Shanti Devi ("**Devi**"). Devi is Sharma's estranged wife.
9. At that time, Sharma and Devi were separated. Sharma had left the property under a Domestic Violence Restraining Order, while Devi and their two children continued living in one of the flats there.
10. Isireli diverted the rental payments from Sharma after Devi told him that Sharma was paying her only \$200 per month in child support which was inadequate to maintain her and the children.
11. Before Isireli diverted the rentals to Devi, he had sought clarity from Devi's lawyers who advised him that Devi was the "*equitable*" owner.
12. On 14 June 2011, Sharma's solicitors issued and served upon Isireli a Demand Notice requiring him to settle all outstanding arrears, discharge all outgoings, and vacate the property.
13. On 5 January 2012, Sharma's solicitors issued and served upon Isireli a second notice, specifying rental arrears in the sum of \$7,150. On 7 January 2012, Isireli's solicitors responded, stating that Isireli would not vacate the property.
14. In his statement of defence and counter-claim filed on 23 April 2012, Isireli asserted that he had been paying rent to Devi, who issued a receipt for each payment.
15. Isireli further pleaded that he had already entered into a formal commercial tenancy agreement with Devi on 29 July 2011. That agreement allowed him to rent the premises for a term of five years commencing 1 July 2011, at the agreed rental of \$650 per month.

16. Isireli also counter-claims as follows:

(i)	refund of bond money
(ii)	loss of investment property
(iii)	renovations
(iv)	loss of business
(v)	Expenses
TOTAL	\$20, 610 - 00

PROCEEDINGS IN THE LOWER COURT

17. The trial at the Nadi Magistrates Court was held on 20 October 2016 before Senior Magistrate Ropate Green. On 14 August 2018, Magistrate Green delivered his ruling, dismissing both the claim and the counter-claim on the basis that he lacked jurisdiction under section 16(2) of the Magistrates Court Act.

18. In his ruling, Magistrate Green noted that a property settlement proceeding was in progress in the Family Court between Sharma and Devi. He opined that the matter was more appropriately resolved by the Family Court.

19. It is common ground that the property settlement proceeding was simultaneously underway in the Family Court.

20. Notably, Devi affirmed in evidence before Magistrate Green that Isireli had paid her the full rental amounts for the period relevant to Sharma's claim.

21. The evidence suggests that Isireli's decision to pay Devi was influenced by the following factors:

- (i) Devi's lawyers' advice.
- (ii) Isireli's desire to have a formal agreement over his tenancy. He merely had an oral agreement with Sharma based on professional trust (both doctors).
- (iii) Devi had approached Isireli to divert the rental payments to her as Sharma's monthly child support was hardly enough to live on.

22. According to an affidavit sworn by Devi on 04 August 2014 in support of Isireli's case, the property was built in 1996, two years after she and Sharma began their *de-facto* relationship. Their two children were born one year and two years after the building's completion. They later married in 2004.

23. It is to be noted also that prior to the start of their *de facto* relationship, Devi had worked in Sharma's dental practice as a dental assistant for some time.
24. In 2011, Devi and Sharma began to drift apart. In that same year, Devi obtained the Domestic Violence Restraining Order which I have referred to above (see paragraph 9). As directed, Sharma vacated the property while Devi continued to reside there with the children.
25. I note that the rental space where Isireli ran his practice was previously occupied by a Dr. Vueti, who also operated a medical practice there. Isireli had worked for Dr. Vueti for some time before taking over the practice in 2000, when Dr. Vueti left to work abroad.

APPEAL OF SRM GREEN'S RULING

26. Sharma appealed SRM Green's decision to the High Court. On 16 October 2018, Mr. Justice Mackie allowed the appeal and set aside SRM Green's Ruling.
27. Mackie J held that SRM Green erred in concluding that the matter would be best resolved in the Family Court. He reasoned that the Family Court proceedings were between Sharma and Devi. The civil proceedings, however, were between Sharma and Isireli. Mackie J accordingly directed that:

A fresh judgement shall be entered by another Magistrate at the Magistrate's Court of Nadi, after adopting the evidence already recorded.

28. The matter was thereafter placed before Resident Magistrate Fernandez, whose ruling of **31 October 2023** is now before this Court.

DE - NOVO APPLICATION REFUSED

29. It is to be noted that, before Magistrate Fernandez, Isireli did file an application through his lawyers for a trial *de novo*.
30. The Learned Magistrate refused the application and proceeded to write the Ruling on the basis of evidence adduced at the trial before SRM Green.

PRELIMINARY

31. There are numerous authorities which affirm that even where the Grounds of Appeal have not been filed within the stipulated time, the Courts have jurisdiction

to extend the time under Order 37 Rule 4 (or even under Order 3 Rule 9 of the High Court Rules, or even under section 39 of the Magistrates Court Act)¹.

32. In this case, the *Notice of Intention to Appeal* was filed on 06 November 2023, six days after the impugned ruling. Clearly, this complies with Order 37 Rule 1² of the Magistrates Court Rules.
33. On 27 November 2023, the *Grounds of Appeal* was filed. This was twenty-seven (27) days after the impugned ruling. This was served on 05 December 2023.
34. Order 37 Rule 3 (1) of the Magistrates Court Rules 1945 provides in its relevant part that *“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”*.
35. Hence, while the *Grounds of Appeal* was filed within time, it was served four (4) days after the expiry of the one-month period.
36. Order 37 Rule 4 provides that:

“...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”
37. Order 37 Rule 3(1) is capable of two interpretations. Firstly, it may be read as requiring that the *Grounds of Appeal* be both filed and served within one month of the impugned decision. Alternatively, it may be interpreted as requiring only that the filing be completed within that period.

¹ (see **Loks Crane and Contractors Ltd v Clutch Systems(Fiji) Ltd**, (HBM 0031 of 1999); **Kirpa Nand v Famous Pacific Shipping (NZ)Ltd** (Civil Appeal no 6 of 2009); **Jan’s Rental Cars (Fiji)Ltd and Prema Nand v Roger Lutz**, (Civil Action HBM 147 of 2014); **Naidu v Dominion Insurance Ltd** [2014] FJHC 171; HBC22.2013 (6 March 2014); **Satya Nand (trading as Satya's Plumbing Works) v Fair Trade Auto Ltd** [2022] FJHC 685; Civil Appeal 21 of 2020 (28 October 2022); **Satya Nand (trading as Satya's Plumbing Works) v Fair Trade Auto Ltd** [2022] FJHC 685; Civil Appeal 21 of 2020 (28 October 2022) ; **Koroidibale v The Commissioner of Police** [2025] FJCA 162; ABU105.2024 (25 September 2025); **Mani v Soqoiwasa** [2025] FJHC 272; Civil Appeal 1 of 2025 (13 May 2025).

² Order 37 Rule 1 provides:

“... 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 ... 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.”

38. I am of the view that the former interpretation is to be preferred, for otherwise, the requirement of service would be left open-ended. Also, this interpretation ensures the respondent is notified promptly, thus preventing unnecessary delay in the appeal process.
39. Having said that, I do observe that Order 37 Rule 4 stipulates that an appeal is deemed to be abandoned if the grounds of appeal are not filed within the one-month period. Notably, there is nothing in this provision which suggests that an appeal will also be deemed abandoned if the *Grounds of Appeal*, though filed on time, is served outside the one-month period.
40. The submissions from both counsel do not address this fine point. I find that:
- (i) the *Grounds of Appeal* was filed within the stipulated time.
 - (ii) accordingly, the deeming provision under Order 37 Rule 4 does not apply in this case.
 - (iii) in the absence of any specific provision or rule to the contrary, an appeal filed on time cannot to be deemed abandoned by the mere fact that it was served four days after the expiry of the time for filing of the *Grounds of Appeal*.
 - (iv) hence, the appeal is still properly before this Court.
41. How should I deal with the late service then? In my view, taking into account that the late service was only by four days, and considering that the *Notice and Grounds of Appeal* were both filed within time, I do have a discretion under section 39 of the Magistrates Court Act to still entertain the appeal. I do so exercise that discretion accordingly.

APPEAL OF RM FERDINANDEZ'S RULING

42. I will not reproduce the seven grounds of appeal verbatim here. However, I deal with them in the analysis which follows.

Were the payments to Devi established as a matter of fact?

43. There is evidence that Isireli did pay the rent in full to Devi. Devi admitted to this in her affidavit (see page 208 of the court records). She also testified to the same effect in Court (see page 103 to 104 of the records).

44. While the Learned Magistrate seems to have accepted this as fact, she appeared to adopt the position that the payment to Devi was irrelevant on account of the fact that the rental agreement was between Sharma and Isireli (see paras 10.2 to 10.7 of the Ruling at pages 78 to 79 of the Records).

Should the Learned Magistrate have directed a trial de novo?

45. Mackie J did expressly direct that *“a fresh judgment shall be entered by another Magistrate at the Magistrate’s Court of Nadi, after adopting the evidence already recorded.”*
46. The appellant cannot now argue that the transcripts are *“erroneous”* and that, accordingly, a trial *de novo* ought to have been conducted. Any alleged error in the transcripts ought properly to have been raised before Mackie J. I am not prepared to revisit that issue.

Was Sharma fully aware that Devi was receiving the rentals?

47. Sharma was fully aware that Devi had been collecting the rent from Isireli. He admitted knowing that Isireli was paying rent to his wife, though he did not know the exact amounts (see pp. 52–61 of the record).

Given that Sharma was fully aware that Devi was receiving the rentals, was it improper for him to still advance a claim for those payments?

48. The rent was lawfully due to Sharma. He was the landlord, and he was the party that entered into the landlord-tenancy agreement with Isireli.
49. The tenancy agreement imposed on Isireli, as tenant, a legal obligation to pay rent to Sharma, and conferred upon Sharma alone, as landlord, the exclusive right to receive that rent.
50. However, the rental payment in this case is connected to the ongoing family property settlement proceedings in the Family Court.
51. At paragraph 6.15 of her ruling, the Learned Magistrate had noted that:

The plaintiff has admitted that there is a Family case regarding the property between him and his wife (now ex-wife).

52. At pages 61 and 62 of the records, Sharma concedes during cross-examination that there was an ongoing family property law case with his wife, Devi. As part of those proceedings, both he and Devi were required to disclose all financial information. He admits that the rentals paid by Isireli to Devi formed part of the financial matters relevant to that property settlement in the family court.
53. The law governing landlord and tenant relations is an intertwining of contract law and property law, reflecting both consensual obligations and proprietary interests.
54. A tenant's possessory interest in a rental property is established through contract. That interest, in turn, gives rise to a range of ancillary rights.
55. Conversely, the landlord's proprietary interest forms the basis of his right to rental income on the property. The provisions of the tenancy agreement give effect to that right.
56. The Learned Magistrate adopted a rigid approach. She chose to enforce the landlord-tenant obligations between Sharma and Isireli without adequately considering the parallel family property settlement proceedings in the Family Court. In doing so, she reached a result that required Isireli to pay Sharma the same rentals he had already paid to Devi—thereby burdening Isireli with double payment, while conferring an unjust windfall upon Sharma's and Devi's joint property pool.
57. In hindsight, this was probably what was foremost in the mind of Magistrate Green when he first heard the case. However, where the Learned Mr. Green erred, in my view, was when he declared that he had no jurisdiction to deal with the matter.
58. In my view, in a situation such as the present, it was open to the Magistrate's Court to stay the proceedings in the Magistrates Court to see how the property settlement case between Sharma and Devi is resolved in the parallel family court proceedings and, depending on the outcome of the family case, either dismiss the Sharma's civil claim against Isireli or make directions for the joining of Devi as a third-party or a co-defendant.

Was the Magistrate justified in dismissing the counter-claim and defence?

59. For the reasons stated above, I am of the view that the Learned Magistrate was not justified in lightly dismissing Isireli's defence.

60. However, I do note that Isireli's counter claim is mostly comprised of special damages. The law requires that these must be specifically pleaded and proved. There is nothing in the records to suggest that evidence was adduced on any of these.
61. I might add that a tenant may claim compensation where the renovations carried out were made to remedy a disrepair or condition which the landlord was legally obliged to rectify but had neglected. Such compensation is available only if the renovations were necessary to restore the premises to a habitable state.
62. To recover, the tenant must provide clear evidence that the landlord was reasonably notified of the disrepair or condition - and that the landlord failed to take appropriate action despite that notice.
63. In commercial leases, tenants are usually not allowed to make alterations or renovations unless they first obtain the landlord's written consent. It is also common for landlords to, at the end of the lease, require a commercial tenant to return the premises in the same condition as when it was first rented. This means the tenant must undo any changes made, or else pay compensation to the landlord.
64. No such evidence was adduced at the trial.

COMMENTS

65. I wish to state at the outset that it has never been clear to me as to whether the property in question is held under a state lease, a native lease, or whether it is in fact a freehold estate. If in fact the property is held under a state or native lease, there is no evidence that the prior consent of the Director of Lands or the i-Taukei Lands Trust Board was ever obtained for the two leases in question.
66. The above issue aside, the oral tenancy agreement, rightfully, must be the foundation of analysis in this case.
67. That agreement established Isireli's obligation to pay rent and Sharma's corresponding entitlement to receive it. Admittedly, Isireli did not follow the proper protocol when he diverted the rental payment to Devi without Sharma's prior consent.

68. Isireli justified his position by saying that he only did so after obtaining legal advice from Devi's lawyers who assured him that Devi was an equitable owner and therefore entitled to the rental payment.
69. Generally, because an equitable interest derogates from, and conflicts with a valid legal entitlement, it would require judicial authority to formally recognise the equitable claim and render it enforceable³. Admittedly, Isireli was ill-advised to redirect payments to Devi without the prior consent of Sharma.
70. Nevertheless, the question as to whether Devi held an equitable interest in the property was a live issue in the property settlement proceedings before the Family Court.
71. It would appear that, at the time they instituted these proceedings, Sharma and his lawyers were fully aware of at least four things:
- (i) firstly, that Isireli had been paying rent to Devi.
 - (ii) secondly, Devi was pursuing an equitable claim over the property which, assuming Sharma was contesting this, the family court would have to make a determination of.
 - (iii) thirdly, whichever way the Family Court resolved Devi's equitable claim, its ruling will affect the ongoing property settlement proceedings between Sharma and Devi.
 - (iv) fourthly, that, although the family court proceedings were strictly between Sharma and Devi, the rentals paid by Isireli to Devi would be taken into account in adjusting the value of her share in the couple's asset pool, regardless of how the Court determined her equitable claim.
72. These prompt the question – what was the predominant purpose for instituting the action in the Court below? Was that purpose an improper one?
73. The Australian High Court in **Williams v Spautz** [1992] HCA 34; (1992) 174 CLR 509 (27 July 1992) where the majority comprising Mason CJ, Dawson, Toohey and McHugh JJ) held that:

“Ifa stay is sought to stop a prosecution which has been instituted and maintained for an improper purpose, it by no means follows that it is necessary, before granting a stay, for the court to satisfy itself in such a case that an unfair trial will ensue unless the prosecution is stopped. There are some policy considerations which support the view that

³ of course, the holder of legal title may simply acknowledge an equitable interest by Deed or Contract or some form of sworn Declaration.

*the court should so satisfy itself. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an application for a stay, **unless once again the interests of justice demand it.** In the United States, great weight has been given to these factors (10) See *Rosemont Enterprises Inc. v. Random House Inc.* (1966) 261 F Supp 691, at pp 696-697."*

74. Lord Evershed in **In re Majorj** (77) (1955) Ch 600, at pp 623-624, said:

*"...court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them **some collateral advantage to himself**, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."*

75. Brennan J said in **Jago** (62) (1989) 168 CLR, at pp 47-48.

"An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. ... Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose."

76. In **Metall and Rohstoff v. Donaldson Inc.** (1990) 1 QB 391 Slade L.J. observed (54) (1990) 1 QB, at p 469:

"(A) person alleging such an abuse must show that the predominant purpose of the other party in using the legal process has been one other than that for which it was designed".

77. In **Goldsmith v. Sperrings Ltd.** (93) (1977) 1 WLR 478, Bridge L.J. said:

"For the purpose of Lord Evershed's general rule, what is meant by a 'collateral advantage'? The phrase manifestly cannot embrace every advantage sought or obtained by a litigant which it is beyond the court's power to grant him. Actions are settled quite properly every day on terms which a court could not itself impose upon an unwilling defendant. An apology in libel, an agreement to adhere to a contract of which the court could not order specific performance, an agreement after obstruction of an existing right of way to grant an alternative right of way over the defendant's land - these are a few obvious examples of such proper settlements. In my judgment, one can certainly go so far as to say that when a litigant sues to redress a grievance no object which he may seek to

obtain can be condemned as a collateral advantage if it is reasonably related to the provision of some form of redress for that grievance. On the other hand, if it can be shown that a litigant is pursuing an ulterior purpose unrelated to the subject matter of the litigation and that, but for his ulterior purpose, he would not have commenced proceedings at all, that is an abuse of process. These two cases are plain; but there is, I think, a difficult area in between. What if a litigant with a genuine cause of action, which he would wish to pursue in any event, can be shown also to have an ulterior purpose in view as a desired byproduct of the litigation? Can he on that ground be debarred from proceeding? I very much doubt it."

78. I have read the Supreme Court's judgement in **Sharma v Biunaitotoya** [2024] FJSC 17; CBV0001.2023 (28 June 2024) which was attached to the Supplementary List of Authorities filed by the Appellant on 3 July 2024. It is noted therein that Sharma and Isireli had a long-standing soured relationship.
79. The claim does not suggest that there was a mortgage on the property, or that Sharma relied on the rental payments to service the mortgage. Nor is there any allegation that the diversion of the rentals to Devi caused some defaults in the mortgage payment, which then attracted an escalating interest.
80. Had that been the case, Sharma might have been perfectly justified in pursuing a claim to seek indemnity from Isireli, notwithstanding the ongoing property settlement case in the family court.
81. That said, it appears that the predominant purpose of instituting and maintaining the civil claim in the Court below was improper. As the High Court of Australia explained in **Williams v Spautz** (supra), proceedings pursued for an ulterior or collateral purpose may be stayed as an abuse of process.
82. In the present case, the action against Isireli bore the same hallmarks of being pursued oppressively, maliciously, and vexatiously. I say this considering:
- (i) that there was an ongoing property settlement proceeding in the family court – which was the alternative and the more appropriate avenue to redress Sharma's concerns,
 - (ii) that the pursuit of the civil case against Isireli would, as it turned out to be, impose undue loss on him while conferring a windfall on Sharma (and Devi).
83. Having said that, I accept that the Magistrates Court, as a creature of statute, may not have jurisdiction to permanently stay proceedings instituted or maintained for an ulterior purpose as an abuse of process– if the Magistrates Court Act does not expressly confer that power upon it.

84. In any event, it was still open to the Learned Magistrate to hear the case and then exercise the power under section 27 (3) of the Magistrates Court Act to dismiss the claim on equitable grounds.

85. Section 27 (3) provides:

In all causes or matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same subject the rules of equity shall prevail.

86. In my view, section 27(3) would allow the Magistrate to:

- (i) consider that the strict application of rental law would compel Isireli to make a double payment.
- (ii) consider that the strict application of rental law would result in an undue windfall on Sharma - consisting of rent directly from Isireli in the civil case, as well as an additional adjustment arising from Devi's prior payments, in the property settlement in the family court.
- (iii) accordingly, dismiss the claim because it would offend every principle of fairness and justice.

CONCLUSION

87. For the reasons stated above, I allow the appeal against the Learned Magistrate's ruling on the claim in the court below. Accordingly, I set aside the award made below.

88. However, I dismiss the appeal insofar as it relates to the decision concerning the counter-claim, for the reasons stated in paragraphs 59 to 64 above. Each party shall bear their own costs.



Anare Tuilevuka
JUDGE

08 January 2026