

**IN THE FAMILY DIVISION OF THE  
HIGH COURT AT LAUTOKA  
ORIGINAL JURISDICTION**

**CASE NUMBER:** 20/LTK/0004

**BETWEEN:** Sharmila

**1<sup>st</sup> Appellant**

**AND:** JI Ltd

**2<sup>nd</sup> Appellant**

**AND:** Monit

**Respondent**

*Appearances:* Mr. Darshik Nair for the Appellants  
Mr. Ashnil Narayan for the Respondent

*Date/Place of Written Judgment:* Friday, 22nd January 2021 at 9.00am/High Court Lautoka

*Coram:* The Hon. Justice Jude Nanayakkara

*Category* All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.

*Anonymised Citation* Sharmila v Monit Lautoka Family High Court Appeal  
20/LTK/0004

**JUDGMENT**

01. This is an appeal from the decision of the Learned Magistrate , delivered on 15-10-2019. The appellant filed Form 9 and 19 in the Magistrates Court on 10-08-2017 for altering interests of parties in the property – property distribution. On 03-10-2017, the respondent filed Form 10 and 19. On 31-10-2017, the appellant filed a reply by way of Form 11. After becoming aware that the appellant had part ownership of the second appellant company, the respondent filed an application for joinder on 06-03-2018 by way of Form 12 and 23. The application for joinder was heard before the Resident Magistrate and the ruling was delivered on 15-10-2019 in favour of the respondent granting leave to join the second appellant to the proceedings.
02. The appellant challenges the decision of the Resident Magistrate.
03. There are nine (09) grounds of appeal set out in the notice of appeal filed on 21-11-2019. The grounds of appeal are:

1. That the learned Magistrate denied JI LTD (“the Company”) natural justice by hearing and determining an application to join the company as a party to the proceedings in the absence of notice to the company of such application.
  2. That the learned Magistrate erred in law by regarding notice of the application to join the Company by the Appellant, a minority shareholder in the Company, as notice by the Company of such application.
  3. That the learned Magistrate erred in principle by regarding the Company as “property” of a party to the marriage in circumstances where only the Appellant’s shares in the Company were, or were capable of being, “property” over which the Court had jurisdiction.
  4. That the learned Magistrate erred in principle by making an order which affected the rights of the third party majority shareholder in the Company which was beyond power and jurisdiction.
  5. That the learned Magistrate failed to give proper, genuine and realistic consideration to the merits of the Appellant’s case.
  6. That the learned Magistrate failed to adequately reveal the process of reasoning which led to his decision.
  7. That the learned Magistrate erred in fact when he failed to consider that the lady had made assurance in court, prior to the hearing, to disclose her shares that she has in the company.
  8. That the learned Magistrate erred in fact when he failed to note that the Respondent man has not proved any interest he has in the Company.
  9. That the learned Magistrate failed to consider issues highlighted with the application in the legal submissions of the Appellant.
04. There is a ‘preliminary objection’. A preliminary objection to the hearing of the appeal is raised by Mr. Narayan, counsel for the respondent. Counsel for the respondent advanced an argument that the ‘notice of appeal’ was filed out of time and there was, therefore, in this case non-compliance with the provisions in Rule 11 of the Family Law Rules which sets out the time within which an appeal by filing a notice of appeal shall be instituted. Counsel concludes by saying that the appeal must be dismissed due to non-compliance with the mandatory provisions in Rule 11 of the Family Law Rules. The attention of the court is called to *Unisan Company Ltd v Virs Construction Company Ltd*, FJHC HBA 22 of 2016 (28-04-2017).
05. I now turn to the appellants. Counsel for the appellants, Mr. Nair did not concede that the ‘Notice of Appeal’ was filed out of time. Counsel submitted that the notice of appeal was lodged at the counter at the Magistrates Court on 08-11-2019 but it was issued on 21-11-2019.
06. In the current climate, it is, first, necessary to observe what the statute says. Rule 11 of the Family Law Rules provides;

## **Institution of appeal**

11.01 An appeal under the Act shall be instituted by filing a notice of appeal in accordance with Form 26 in the court appealed from within-

- (a) one month after the day on which the order appealed from was made  
or
- (b) such further time as that court orders

07. The wording of Rule 11 of Family Law Rules is perfectly clear to me. The language is clear and distinct; “one month after the day on which the order appealed from was made”.
08. The Resident Magistrate delivered the ruling on 15-10-2019. In terms of Rule 11, the time for filing notice of appeal began to run from 15-10-2019. Hence, the notice of appeal should have been filed no later than 14-11-2019.
09. The examination of the record of the Magistrate’s Court shows that the notice of appeal has been filed on 21-11-2019. The filing fee has been paid on the same day.
10. This is corroborated by the memo dated 19-02-2020 from Senior Court Officer Magistrates Court to Senior Court Officer, Family Court,
11. There is a distinction between the time at which a notice of appeal is lodged (in the sense of being physically received by the Magistrates Court) and the time the notice of appeal is filed (in the sense of being accepted for filing, say on the presentation of the requisite filing fees).
12. Here, the question is as to when the notice of appeal was accepted by the Magistrates Court Registry as being filed (as opposed, for example, to having been physically received at the Magistrates Court Registry but not accepted as filed in the absence of filing fees). Logically, there must be such a distinction. A notice of appeal lodged in the Magistrates Court in the sense of physically received by the court without the requisite filing fees would not be treated as having been ‘filed’. The concept of “filed” must mean accepted by the Registry staff with the requisite filing fees.
13. Having said that, I do not consider the date of lodging the notice of appeal in the absence of requisite filing fees as the date of filing the notice of appeal for the purposes of Rule 11 of the Family Law Rules.
14. Therefore, it can be safely said, that the notice of appeal was accepted by the registry as being filed (as opposed to having been physically received) on 21-11-2019. (See paragraph (9) and (10) above). Any appeal on the Learned Magistrate’s decision should have been filed no later than 14-11-2019. There is no doubt, it is quite clear that the appeal was filed after the expiration of one month after the decision was pronounced and the mandatory provisions in Rule 11 in the Family Law Rules have not been complied with. It is perhaps worth noting that there was no application before the Resident Magistrate for an extension of time.
15. One word more, ‘Notice of Appeal’ within the exact terms of the provisions in Rule 11 coupled with the ‘Grounds of Appeal’ is the very basis of the jurisdiction of this Court to deal with the Appeal. Without that foundation to work upon, the Court has nothing before it that is appealed against. It is really more than a mere technical non-compliance with the

requirements of the Family Law Rules. It touches the very root of the Appellate proceedings. To be more precise, the objection goes to the very root of the Appellate proceedings.

I have no jurisdiction to hear the appeal!

16. With respect, it is not the duty of the Court to look to the hardship of any particular case. The Court must decide upon the words alone of the Statute or the Rules.
17. I think, for these reasons, I hold that the preliminary objection to the Appeal is well founded. The objection goes to the foundation of the jurisdiction. That really concludes the matter and that the Appeal should be dismissed.
18. Let me add this. The objection to the Appeal is not purely technical. I think costs must be allowed.
19. Finally and most significantly, right of Appeal is a 'Statutory Right' and the provisions in the Statute and the Court Rules must be strictly complied with. I am quite satisfied, so far as the provisions in Family Law Rule 11 is concerned, that the Appellant is out of time. The provisions in Family Law Rule 11 cannot be waived.
20. I feel compelled to add that the need for and the importance of complying with the Rules were emphasized as far back as 1984 by the Fiji Court of Appeal in "Kenneth John Hart v Air Pacific Ltd", (Civil Appeal NO. 23 of 1983, Judgment delivered on 16th July 1984).
21. In 1995, the Fiji Supreme Court, the highest Court in the land warned; "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" See; Venkatamma v Ferrier – Watson, (Fiji Supreme Court Civil Appeal No. CBV 0002 of 1992, judgment delivered on 17th November 1995, at p.3 of the judgment.)
22. In August, 1997, the Fiji Court of Appeal in Rabuka v Dreunimisimisi ( 1997, FJCA 24) held as follows:-  
  
"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in Venkatamma, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the Appeal."
23. In the decision of the Privy Council in Ratnam v Cumarasamy and Another [1964] 3 All E.R. at page 935 , Lord Guest in giving the opinion of the Board to the Head of Malaysia said, inter alia:  
  
"The rules of court must, Prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his Solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this

did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle.”

(Emphasis added)

#### ORDERS

1. The preliminary objection is upheld.
2. The appeal is hereby dismissed.
3. The appellants are ordered to pay costs of \$1500.00 (summarily assessed) to the respondent within 14 days hereof.

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Jude Nanayakkara  
[Judge]

High Court –  
Friday 22nd January, 2021