

**VENAIGAM PILLAY v GEORGE KAMLES PRASAD
(MISC0035 of 2011)**

COURT OF APPEAL — MISCELLANEOUS JURISDICTION

5 CALANCHINI AP

19, 30 March 2012

10 **Practice and procedure — appeal — ex parte judgment — extension of time to appeal — setting aside judgment — re-hearing — question of law only — whether Court has jurisdiction to hear appeal — Court of Appeal Act ss 12(1)(c), 13, 20 — Court of Appeal Rules r 22 O 59, rr 10, 11 — Magistrates Courts Rules O 30, rr 3, 5, O 37 r 13.**

15 The appellant appealed against a decision of the Magistrates' Court granting the relief sought by the respondent. The relief was granted ex parte, as the appellant failed to appear. The High Court struck out and dismissed the appellant's appeal ex parte, as the appellant again failed to appear. The appellant subsequently applied for an extension of time to appeal and a stay of execution pending appeal.

20 **Held –**

(1) The appeal procedure is generally not appropriate in cases where orders or judgments have been made or entered ex parte. The appropriate course of action for a party who did not attend a hearing was to apply to the judge in the court below to have the ex parte order or judgment set aside for the purpose of a re-hearing.

25 (2) The grounds of appeal raised questions of mixed law and fact. The Court has no jurisdiction to hear an appeal from a decision of the High Court exercising its appellate jurisdiction unless the appeal grounds raise questions of law only.

Application dismissed.

Case referred to:

30 *Edwards Will Trusts; Edwards v Edwards* [1981] 2 All ER 941, considered.

M Tikoisuva for the Appellant.

Respondent in person.

35 **Calanchini AP.** This is an application by the Appellant for an extension of time to file a Notice of Intention to Appeal and Grounds of Appeal. The Appellant also seeks a stay of execution pending the determination of the appeal. Pursuant to s 20 of the Court of Appeal Act Cap 12 (the Act) a judge of the Court may exercise the power of the Court to extend the time within which a notice of appeal
40 may be given. The power of the Court to extend time for filing a notice of appeal is to be found in s 13 of the Act and r 22 of the Court of Appeal Rules (the Rules).

In an interlocutory ex tempore judgment delivered on 18 January 2011 by the High Court (Inoke J) at Lautoka, the Appellant's appeal from a decision of the Magistrates Court was struck out and dismissed.

45 The background to the present application may be summarised from the account in the judgment of the court below.

The Respondent filed his claim in the Lautoka Magistrates Court on 9 September 2008 against the Appellant and his bailiff for damages and other relief. The Appellant did not appear in the Magistrates Court to defend the claim.

50 The Respondent formally proved his claim and the learned Magistrate granted the relief claimed ex parte.

The Appellant appealed to the Court below on 31 May 2010. When the appeal was first called before the learned Judge both parties appeared. At the request of the parties on 20 August 2010 the appeal was listed for hearing on 6 December 2010.

5 Then on 29 October 2010 the Respondent filed and served a summons to strike out the appeal. It was also returnable on 6 December 2010. The Appellant did not appear on 6 December 2010. Both the appeal and the application were then listed for hearing on 18 January 2011. The Appellant did not appear. At the request of
10 the Respondent the learned Judge struck out the appeal and made ex parte orders accordingly.

The present application by the Appellant raises some not insignificant procedural issues.

15 The appeal by the Appellant from the Magistrates Court to the Court below was filed pursuant to the right to appeal under O XXXVII of the Magistrates Courts Rules. I have some doubt as to whether there is any jurisdiction vested in the Court below to hear and determine an application to strike out an appeal filed under O XXXVII. There is no material in the file to indicate upon what grounds
20 the application was made. However the High Court's jurisdiction in this regard is statutory and the appellant's right to appeal is 'of right' under O XXXVII.

The orders made by the learned Magistrate were made in the absence of the Appellant and were therefore orders made ex parte. Quite properly the learned Magistrate proceeded, in the absence of the Appellant, in accordance with
25 O XXX r 3 of the Magistrates Court Rules. There appears to be no doubt that he gave judgment on the evidence adduced by the Respondent. What the Appellant should have done next is clearly set out in O XXX r 5 which states:

30 *'Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the Court, upon such times as may seem fit.'*
'Court' is defined in paragraph 2 of the Rules as *'a magistrates court.'*

Generally the appeal procedure is not appropriate in cases where orders or judgements have been made or entered ex parte. The appropriate course of action for a party who did not attend a hearing is to apply to have the orders or judgment
35 set aside.

A similar provision is found in the Magistrates Courts Rules in respect of the appeal hearing in the court below (ie in the High Court). O XXXVII r 13 states:

40 *'(1) If the appellant fails to appear, in person or by barrister and solicitor, when his appeal is called on for hearing, the appeal shall, on proof of service upon him of the notice of the hearing, stand dismissed with costs.'*

*'When an appeal has been dismissed owing to the non-appearance of the appellant or his barrister and solicitor, the appellate court may, if it thinks fit, and on such terms as to costs or otherwise as it may deem just, direct the appeal to be re-entered for
45 hearing.'*

In respect of civil proceedings at first instance in the Magistrates Court and in respect of appeals to the High Court from decisions of the Magistrates Court there are in the Rules of both Courts specific provisions for judgments or orders made ex parte. The rules allow for an absent party to apply to have the ex parte
50 judgment or order set aside for the purpose of a re-hearing. That application is made to the Court that entered judgment or made the order ex parte.

In *Re Edwards's Will Trusts, Edwards v Edwards* [1981] 2 All ER 941 the Court of Appeal provided some useful guidance as to the correct approach to be adopted when a party may apply for a re-hearing or appeal to the Court of Appeal. At page 949 Buckley LJ stated:

5 *'Where a civil action has been tried without a jury, the Court of Appeal has jurisdiction, on hearing an appeal, to set aside the judgment of the trial judge and to order a new trial, or to correct any error by the trial judge of fact or law and to vary the judgment appropriately. [See O 59 r 10 and 11]. (See also Court of Appeal Act Cap 12 and Court of Appeal Rules). ____. Where any judgment, order or verdict has been*
 10 *obtained in the absence of any party, the Court of Appeal can entertain an appeal. They can deal with any such appeal on its merit or alternatively set the judgment (etc) aside and order a new trial. But if the party who has been absent from the trial wants to apply for a new trial he should apply (under the appropriate rule) not to the Court of Appeal but the court which tried the action and, if possible, to the trial judge himself. From the refusal of such an application an appeal will lie to the Court of*
 15 *Appeal.*

But the existence of the jurisdiction of the court under (O XXXVII) does not negative the co-existence of the Court of Appeal's jurisdiction.'

However, in the present application, what does limit the co-existent
 20 jurisdiction of this Court is s 12 (1)(c) of the Court of Appeal Act which provides:

'___ an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal:-

(a) ___

(b) ___

25 *(c) on any ground of appeal which involves a question of law only, from any decision of the High Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal.'*

There is exhibited to the affidavit in support sworn by Venaigam Pillay a
 30 proposed notice and grounds of appeal. The three grounds of appeal in my judgment raise questions of mixed law and fact. The grounds do not raise questions of law only.

As a result the application is dismissed for two reasons. First, the correct
 35 course of action for the applicant to adopt was to apply for a re-hearing to the learned judge in the court below. Secondly, in any event this Court has no jurisdiction to hear an appeal from a decision of the High Court exercising its appellate jurisdiction unless the appeal grounds raise questions of law only.

The application is dismissed and the applicant is ordered to pay to the Respondent costs which are fixed at \$200.00 within 28 days.

Calanchini AP

40 **Order**

1. The applications by the Appellant are dismissed.
2. The Appellant is to pay to the Respondent costs of \$200.00 within 28 days.

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Application dismissed.

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