

IN THE COURT OF APPEAL, FIJI AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0041 OF 1999
(Suva High Court Civil Action No. 427 of 1993)

In Chambers

BETWEEN: FANUZA LIMITED
 ZARIN KHAN
 NUR ALI

Applicants/Appellants
(Original Defendants)

AND: MELVYN BLOOM
 YVONNE BLOOM
 LINLUCK NOMINEES LIMITED

Respondents
(Original Plaintiffs)

Dr M.S. Sahu Khan for the Applicants/Appellants
Mr R.A. Smith for the Respondents

DECISION

(Leave to appeal out of time and stay order)

On 5 January 1995 judgment was given against the Applicants in High Court Civil Action No. 427 of 1993 whereby they were inter alia to pay into Court the sum of \$100,000 pending Reserve Bank permission to pay same out to the third Plaintiff, Linluck. No date for payment was specified.

The Applicants appealed to the Court of Appeal which dismissed their appeal on 15 November 1996. (See FCA Civil Appeal No. ABU0004 of 95S). The Applicants then appealed to the Supreme Court which on 26 March 1998 also dismissed the appeal. The concluding part of the Supreme Court's judgment reads as follows -

"It follows that the appeal must be dismissed with costs. The transfers remain in escrow and the \$100,000 must be paid into court. The question of payment out and the future of the transfers is for the High Court. We reserve leave to any party to apply to the High Court for directions in the light of the existing evidence and such evidence of the Reserve Bank's current attitude as the High Court in its discretion may allow to be given."

(See p.7 of Supreme Court's judgment in Civil Appeal No. CBV0003 of 1996S.)

It is therefore clear that the substantive dispute between the parties has been finally determined in favour of the Respondents. The only real issue that remains to be determined now is when the Applicants should pay \$100,000 into the High Court.

On 4 July 1997 the High Court specified that the sum of \$100,000 be paid within 7 days of service of the Order (2nd Order). There was no appearance of Respondents or their Counsel when this Order was made on Summons.

On 24 August 1999 the Applicants filed summons in this Court seeking the following Orders -

- (i) *That leave be granted to the Appellants to file the Notice and Grounds of Appeal out of time and the Appellants be granted seven days time to file Notice and Grounds of Appeal.*
- (ii) *For an Order that the execution of the Order made on the 4th day of July, 1997 be stayed pending the determination of the Appeal."*

Both parties have filed written submissions and affidavits in support. Both sides have agreed that a decision be given on notice without further oral argument.

Applicants' Affidavit in Support

Nur Bano Ali's affidavit filed in support of the application reads (in part) as follows -

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- 5. THAT the Second Order was made pursuant to a Summons dated 4th day of February, 1997 ("The first Summons").
- 6. THAT to the best of my knowledge information and belief the First Summons was not served on any of the Appellants personally as required by the Rules of the High Court.
- 7. THAT the Second Order was not sealed until the 21st day of October, 1998.
- 8. THAT no Notice of Intention to Proceed was given by the Respondents to the Appellants either before the issue of the First Summons or the sealing of the Second Order.
- 9. THAT the Second Order was amended and a new Order was sealed on the 4th day of December, 1998 ("the Third Order").

10. THAT no leave of the High Court was sought or granted before the Third Order was amended and annexed herein and marked as annexure "C" is a copy of the Third Order.
11. THAT the Respondents made application to this Honourable Court for the leave to issue Writ of Sequestration and annexed herein and marked as annexure "D" is a copy of the Notice of Motion so filed on the 26th day of January, 1999.
12. THAT the matter was set down for hearing on May 10th, 1999 when after some preliminary hearings the matter was adjourned for hearing on 29th July, 1999 when our Counsel raised substantive issues of law and validity of the application and consequently after part heard the Respondents withdrew the application with a view to commencing the whole matter again.
13. THAT the Respondents have been advised by their Solicitors and verily believe that the Order made by this Honourable Court on the 4th day of July, 1997 ought not to have been made in view of the mandatory provisions of the High Court Rules for proper service of the application on the Appellants personally and that Notice of Intention to Proceed was not given since no steps in the proceedings were taken for over twelve months.
14. THAT the Appellants pray to this Honourable Court for leave for the Appellants to appeal to the Honourable the Fiji Court of Appeal and the grounds of appeal are:
 - (i) That this Honourable Court erred in law and in fact in making the Order on 4th day of July, 1997 whereby it was ordered "that the Defendants Fanuza Limited, Zarin Khan and Nur Ali, having been ordered by judgment in this action entered on 19 January 1995, inter alia, to pay the sum of \$100,000.00 into Court pending Reserve Bank permission to pay the same out to the Third Plaintiff, do so pay before the expiration of 7 days from the service on them or any of them of this order" in as much as no such Order should have been made until and unless the Appellants had been personally served with the necessary application in view of the mandatory provisions of the High Court Rules.
 - (ii) That the learned High Court Judge erred in law and in fact in making the said Order referred to in ground (i) above in as much as the original order in respect of the Judgment delivered on 5th day of January, 1995 had not been served on the Appellants personally as required by the mandatory provisions of the High Court Rules.
 - (iii) That the learned trial Judge erred in law and in fact in making the Order on the 4th day of July, 1997 on application by Summons dated 4th February, 1997 when there was no Notice of Intention to Proceed had been given to the Appellants as required by the High Court Rules when no steps in the proceedings have been taken between 5th January, 1995 and the 4th February, 1997 and in any event 12 months had elapsed before the steps had been taken on 4th February, 1997 and accordingly, all the proceedings in respect of the Summons dated 4th February, 1997 were ineffective, null and void.

15. THAT all the above matters were drawn to our attention at the hearing of the matter on the 29th July, 1999 and we only became aware of the Order when we were served after the sealing in December, 1998.
16. THAT we have been advised that the proceedings by way of Writ of Sequestration and/or contempt are quasi criminal in nature and that the Rules of Court must be strictly complied with.
17. THAT accordingly, the matters intended to be raised on appeal are matters of great importance and I verily believe that this issue has never been subject to any decision of the Courts in Fiji and consequently it is of public importance that the matter be so decided."

The Order in question was made on 4 July 1997. It was sealed on 21 October 1998. Therefore under Rule 16 of the Court of Appeal Rules the time for appealing expired on 11 November 1998, i.e. 21 days after sealing. The sealed Order was served on 10 December 1998. The present application was filed on 28 August 1999 some 8 months after service of the sealed Order.

Although the sealed Order was not served until 10 December 1998, i.e. well after the 21-day appeal period had expired, there is no statutory obligation on the party sealing the order to serve such an Order. However it is open to a single judge to take that fact into account in determining an application for leave to appeal out of time - see The Official Receiver v Petrie Limited FCA 0049 of 1997 p.7.

The Applicants' main argument is that relevant summons was not served on them personally as required by Order 45 r 5(3). The Respondents counter this by saying that any defect was cured by subsequent appearance by Counsel without protest and there was in fact no injustice.

Respondents' Reply

The Applicants' objection to Mr Tomasi Tuitoga's affidavit filed on behalf of the Respondents is very technical and has not caused any prejudice to the Applicants. In any case Mr Kapadia's appearance before the Deputy Registrar is a matter of court record.

Paragraphs 4, 5 and 6 of Mr Tuitoga's affidavit of 4 October 1999 showeth as follows -

- "4. *By letter dated 19 February 1997, the Appellants solicitors Messrs Sahu Khan & Sahu Khan, were advised by Munro Leys that the Summons had been served their city agents in Suva and an adjourned date for the hearing of the Summons was being sought. I annex hereto and mark "TT5" a copy of this letter.*

5. *By letter dated 24 February 1997 to Munro Leys, copied to Messrs Sahu Khan & Sahu Khan, the High Court Registry advised that the Summons would be called before the Deputy Registrar to fix a hearing date. I annex hereto and mark "TT6" a copy of the letter dated 24 February 1997 from the High Court Registry.*
6. *I am informed and believe that on 18 June 1997, Mr Kapadia appeared before the Deputy Registrar on instructions from Messrs Sahu Khan & Sahu Khan for the Plaintiffs. A hearing date of 4 July 1997 was fixed. I annex hereto and mark "TT7" a copy of a filenote by Mr Richard Naidu of our office, noting his attendance before the Deputy Registrar. I am informed and believe that no issue as to service of the Summons was brought up by the Appellants counsel at this appearance."*

Accordingly the Respondents contend that the delay has not been satisfactorily explained and that the Appellants have waived their right to any challenge as to the regularity of service and cannot now assert that the 4 July 1997 Order was defective. Counsel for Respondents submits that an unconditional appearance is a waiver of any antecedent irregularities as to service - See Elefanten Schuh GmbH v Jacqmain (No. 150/80) [1981] ECR 1671 cited in The Supreme Court Practice 1999, Vol. 1, p. 122.

The purport of Respondents' arguments on the grounds of appeal relating to the issues of -

- (i) defective service
- (ii) failure to give Notice of Intention to Proceed, and
- (iii) the alleged "Amendment" of the Order

is to show that the proposed appeal has little substance. I am inclined to agree.

The delay in appealing in time and especially the long delay in bringing this application for leave to appeal out of time has not in my view been satisfactorily explained. However in so far as the grounds of appeal are concerned I remind myself that I am not sitting on appeal and that whilst I am entitled to take into account the apparent strength or weakness of the appeal I ought not to deny the Appellants an opportunity to ventilate their grievance on a question of alleged lack of jurisdiction.

In the circumstances I will reluctantly grant the application sought but subject to conditions.

Order

Leave to appeal out of time and stay of execution of the High Court Order dated 4 July 1997 granted subject to the following conditions -

- (i) Notice and Grounds of Appeal to be filed and served within 10 days.
- (ii) The Applicants to deposit in this Court the sum of \$100,000 within 10 days.
- (iii) If the appeal is not filed and served in time and if the said sum of \$100,000 is not deposited as ordered then leave to appeal and the stay order shall be deemed to have expired.
- (iv) If the appeal is filed and served in time and the sum of \$100,000 deposited as ordered the said sum shall be paid out as per direction of the Court of Appeal.

The costs of this application shall be costs in the appeal.

Dated at Suva this 10th day of February 2000.

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Sir Moti Tikaram
President, Court of Appeal, Fiji

