

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU 65 OF 2015**  
**(High Court No. HBC 89 of 2000)**

**BETWEEN** : HUSSEIN SAKOOR SAMUT  
*Appellant*

**AND** : LODHIAS TRAVEL SERVICES LIMITED  
*Respondent*

**Coram** : Chandra RJA

**Counsel** : Mr. G. O'Driscoll for the Appellant  
Mr. P. Sharma for the Respondent

**Date of Hearing** : 7 June 2016

**Date of Ruling** : 7 December 2016

**RULING**

- [1] This is an application dated 9 September 2015 seeking leave to appeal out of time in respect of a judgment of the High Court which was delivered on 28 April 2015.
- [2] The Respondent filed a writ of summons 3 March 2000 against the Appellant to recover a sum of \$50,939.15 with interest and costs.

- [5] The Appellant had accepted the writ of summons and filed a statement of defence denying liability.
- [6] On 5 January 2012 the High Court Registry had issued a notice of Mention/Hearing and sent it by facsimile to the Counsel for the Respondent and of the Defendant. The Notice stated that the matter would be called for Mention on 25 January 2012 at 9.30 a.m.
- [7] Counsel for the Respondent had appeared on 25 January 2012 but the Appellant had not been present nor had there been an appearance for the Appellant.
- [8] On 25 January the matter was adjourned to 24 February 2012 for mention.
- [9] On 15 February 2012 the High Court Registry advised the Respondent's Counsel that the matter listed for mention on 24 February 2012 was vacated and was listed for mention on 23 February 2012.
- [10] On 23 February 2012 Counsel for the Respondent had been present but the Appellant nor his Counsel had been present.
- [11] On 23 February 2012 the learned High Court Judge ordered that time was given till 10 March 2012 for the filing of additional bundle of documents and the matter was adjourned to 13 April 2012 at 9.30 for hearing.
- [12] The High Court was to serve a Notice of Adjourned Hearing on the Appellant's Lawyers.

- [13] On 13 April 2012 when the matter was taken up for hearing, the learned High Court Judge had directed the Court Officials to call out the name of the Appellant and his Counsel. However, there had been no response to same and the Appellant and his Counsel were not present at the hearing. The learned High court Judge had proceeded to hear the Respondent's claim and determined the matter in favour of the Respondent.
- [14] On receiving the order of the Court given on 13 April 2012 the Respondent had informed his Counsel who had then made inquiries from the Registry regarding same.
- [15] The Appellant's Solicitors had written to the Hon. Chief Justice on 11 October 2012 stating that the Court had proceeded to give its decision without giving any notice to the Appellant or his Counsel.
- [16] On 18 October 2012 the Hon. Chief Justice had advised the Appellant that the clerk handling the matter had failed to issue a notice of adjourned hearing to the Appellant's Solicitor or their City Agents which led to non-appearance by their firm or the Appellant on 13 April 2012.
- [17] On 6 September 2012 the Appellant's Solicitors made an application to the High Court to have the judgment entered against the Appellant on 13 April 2012 set aside and the said application was heard on 17 October 2012.
- [18] The learned High Court Judge delivered his Judgment on 28 April 2015 dismissing the application of the Appellant.



- [19] On 9 June 2015 the Appellant filed a Notice of Appeal to the Court of Appeal within time.
- [20] On 11 June 2015 the Appellant's Solicitors had filed summons to fix security of costs and the case was called on 7 July 2015 and security for costs had been fixed at \$2,500.00.
- [21] On 25 August 2015 the Appellant's Solicitors were informed that the Appeal had been abandoned due to non-payment of security for costs.
- [22] On 31 August 2015 the Appellant filled an application for leave out of time against the judgment of the High Court delivered on 28 April 2015.
- [23] The application for leave to appeal out of time has been made by the Appellant pursuant to Section 20(1)(a) and (b) of the Court of Appeal Act.
- [24] The Respondent has taken up the position that the decision that the Appellant is seeking to appeal out of time is an interlocutory order and that the applicable provision is section 12(1)(f) of the Court of Appeal Act.
- [25] The Respondent has further submitted that since the decision appealed against is an interlocutory order, in terms of Rule 26(3) of the Court of Appeal Rules that such an application should be made in the first instance to the Court below and has cited the decision in Goundar v. The Minister for Health [2008] 2008 FJCA 40; ABU0075.2006S99 July 2008) and the decisions that have followed it subsequently.

- [26] On the other hand the Appellant has treated the decision appealed against as a Final Order and has sought leave in terms of Section 20(1)(a) and (b) of the Court of Appeal Act.
- [27] In my view the decision of the High Court delivered on 28 April 2015 is a Final Order which could have been enforced if not for the appeal filed by the Appellant. The Appellant had as set out above filed an appeal and that appeal was deemed to have been abandoned due to the lapse on the part of the Appellant to deposit security for costs of the appeal. It is thereafter that the Appellant has sought to file an application to appeal out of time in terms of section 20(1)(a) and (b) to the Court of Appeal.
- [28] In my view the Appellant has sought his relief in the proper forum and therefore this Court has jurisdiction to consider it.
- [29] In an application seeking leave to appeal out of time the Court is generally concerned with four issues: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the proposed appeal succeeding and (4) prejudice to the Respondent. (**Datt v. Datt** [2013] FJCA 58; Civil Misc. Action 33.2011 (7 June 2013).

### **The length of the Delay**

- [30] The present application is to appeal against the judgment of the High Court which was delivered on 28 April 2015. The Applicant had in fact taken steps to file an appeal on 9 June 2015 but that appeal was abandoned on 25 August 2015 due to non payment for security for costs. The present application seeking leave to appeal out of time was filed on 8 September 2015.



[31] On the face of it, the present application has been filed after 134 days from the judgment of 28 April 2015. It would appear at first hand to be a substantial delay, but this delay has to be considered in the light of the sequence of events where the appeal that was filed was abandoned on 25 August 2015. The present application had been filed within two weeks from the abandonment of the appeal. This is not to state that it is an excusable delay as the abandonment of the appeal was due to their lapse and will have to be viewed with the other reasons that are considered for granting extension of time.

### **The reasons for the Delay**

[32] As stated above the reasons for the delay had been the fact that the appeal filed by the Applicant was abandoned due to non-payment of the security for costs of the appeal. This was a lapse on the part of the Appellant and therefore by itself is not a good enough reason to grant an extension of time.

### **Whether the Appellants have any meritorious grounds of appeal that will probably be successful**

[33] The decision that the Appellant sought to set aside by his motion filed on 6 September 2012 was delivered on 28 April 2015 after hearing both parties on 28 February 2013. Before the hearing both parties had filed their affidavits in support of their positions and filed written submissions.

[34] The position taken up by the Appellant before the High Court was that he nor his Solicitors had received notice of the hearing that was held on 13 April 2012.

[35] The strongest item of support for that position was the letter sent by the Hon. Chief Justice to the Appellants Solicitors on 18 October 2012 (filed with the affidavit of the

Appellant and placed before the High Court before the hearing on 28 February 2013) in reply to the letter of 11 October 2012 which stated mainly:

*"I acknowledge your letter dated Thursday 11<sup>th</sup> October 2012 with regards to the above matter.*

*Please be advised that on the 15<sup>th</sup> of February*

*2012, a letter was written by the Chief Registrar's Office to the Counsel for the Plaintiff, which was copied to your office, advising that the above matter which had been listed for mention on the 24<sup>th</sup> of February 2012, before a Judge of the High Court at 9.30 am had been shifted to the 23<sup>rd</sup> of February 2012 at 9.30 am.*

*When the matter was called on the 23<sup>rd</sup> of February 2012 at 9.30 am, there was no appearance by you or by your City Agents. On this particular date the Judge fixed the hearing date for the 13<sup>th</sup> of April 2012 at 9.30 am with Notice to the 3<sup>rd</sup> Defendant. However, the Clerk handling the matter failed to issue the Notice of Adjourned Hearing to you or your City Agents, which led to no appearance on 13 April 2012, hence orders were made against your client the 3<sup>rd</sup> Defendant when he was not represented."*

[36] The learned trial Judge in his judgment dismissing the motion of the Applicant stated that there was no breach of natural justice and that the Appellant did not justify the default.

[37] The learned trial Judge in his judgment stated:

*"5.4 Thereafter the matter was fixed to be mentioned on 24 February 2012 and this Court directed the Registry to inform the Defendant's solicitor. The Court registry by its letter dated 15 February 2012 informed the solicitors Patel Sharma Lawyers for the Plaintiff and Iqbal Khan Associates for the 3<sup>rd</sup> Defendant the matter listed for mention on 24 February 2012 was to be fixed for 23<sup>rd</sup> February 2012.*

*5.5 On 23<sup>rd</sup> February 2012 when the matter was mentioned the Plaintiff's Counsel appeared and the 3<sup>rd</sup> Defendant or his counsel/solicitor were not present. I note there was no cogent reason given by the 3<sup>rd</sup> Defendant for his absence, in his Affidavits, except merely stating the notice was received which was not substantiated. On this day the Plaintiff's Counsel made an application to file*



*additional bundle of documents and this court directed to file the additional bundle of documents before 10 March 2012 and the matter was fixed for hearing on 13 April 2012 at 9.30 a.m. ... ..”*

- [38] It is apparent from the letter from the Hon. Chief Justice (quoted above at para.35), that the learned trial Judge’s reasoning was different, as he had stated that the Court Registry had informed the Solicitors of both parties by its letter dated 15 February 2012 whereas according to the Hon. Justice’s letter the Clerk at the Registry handling the matter had failed to send it to the Appellant’s Solicitor.
- [39] At the time that the matter was heard by the learned High Court Judge the Hon. Chief Justice’s letter was a document relied on by the Appellant in his affidavit and was before Court. However, there is no reference to this letter in the judgment of the learned trial Judge which would appear to mean that he had not considered it in his judgment which I think was vital.
- [40] In view of that position, the hearing on 13 February 2012 in the absence of the Appellant and/or his Counsel was due to the fact that the Appellant nor his solicitors had been notified by the Registry of the Court of the date fixed for hearing.
- [41] Since the learned trial Judge had failed to consider this position, there is merit in the position taken up by the Appellant and is likely to succeed.

### **Prejudice to the Respondent**

- [42] It is quite apparent that the Respondent would be prejudiced as he would be anxious to reap the fruits of the judgment that he has in his favour. However, if such judgment has



been given without hearing the other party it is a fairly substantial matter which overweighs any prejudice that may be caused to the Respondent.

[43] In view of this position I would grant the Appellant extension of time to appeal.

**Orders of Court**

- (1) *Application for extension of time to appeal is allowed.*
- (2) *The Appellant is to file and serve an amended Notice of Appeal (if any) within 14 days from the date of this Ruling.*
- (3) *Parties to bear their own costs.*



A handwritten signature in blue ink, appearing to read "S. Chandra".

**Hon. Justice S. Chandra**  
**RESIDENT JUSTICE OF APPEAL**