

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Appeal No. ABU 0030 of 2015
High Court Civil Action No. HBC 181.2009

BETWEEN : RAJESHWAR PRASAD

Appellant

AND : JAISHREE LAL

1st Respondent

AND : PRAVEEN KUMAR

PANKAJ KUMAR

PRADEEP KUMAR

2nd Respondents

Coram : Chandra, JA
Lecamwasam, JA
Seneviratne, JA

Counsel : Mr. G. O'Driscoll for the Appellant
Mr. S. Chandra for the Respondent

Date of Hearing : 7 February 2017

Date of Judgment : 23 February 2017

JUDGMENT

Chandra, JA

[1] I agree with the judgment of Justice Lecamwasam

Lecamwasam JA

- [2] This is an appeal filed by the Plaintiff /Appellant against the judgment of the Learned High Court Judge at Suva dated 24th March 2015.
- [3] Facts of the case are succinctly stated by the learned High Court Judge in paragraphs 1 to 9 of his judgment which makes a repetition of the same redundant. Further the facts transpired by way of evidence are also mentioned in his judgment in paragraphs 10 – 13.2 making a repetition redundant again.
- [4] The grounds of appeal are as follows:-
- (1) That the learned trial judge erred in law and in fact in finding that the sale and purchase agreement entered into between Ram Dulari and Dev Kumar on 8th June 1973, could not be enforced due to limitation without considering the caveat that had been placed and somehow removed and also without considering the fact that the new title for the subject piece of land under the said agreement was only final issue in 2006.
 - (2) That the learned trial judge erred in law and in fact in finding that the Plaintiff has taken no steps to enforce the agreement after having been appointed as Administrator of his late mother's estate particularly because the claim was made as a beneficiary of the State and not as the administrator of same.
 - (3) That the learned trial judge erred in law and in fact in failing to find any evidence of fraud on the part of any of the defendants particularly in view of the caveat that was somehow removed without being applied to be removed to a Court Order or otherwise or withdrawn by Ram Dulari or her representatives.

- [5] Although the arguments of the case are mainly based on substantive matters, this Court has noticed a very important factor on perusal of the record, to which neither party has adverted their attention.
- [6] In this case, the judgment had been delivered by the learned High Court Judge on 24th March 2015 and the notice of appeal had been filed on the 27th may 2015, .i.e. approximately 63 days after the date of judgment. However, as this is a final judgment, the appellants should have filed the Notice of Appeal within 42 days. Therefore the notice of Appeal is well out of time.
- [7] As parties were oblivious to this matter, at that point in time, the question now arises whether this Court can 'ex-mere-motu' take cognizance of this matter. It is well known that parties cannot either confer jurisdiction or withdraw jurisdiction. It is for the Courts to decide upon, if such circumstances warrant such. Similarly, it is a matter for the Court to jealously protect and safeguard the procedure laid down by statute, which is essential to preserve judicial order, certainty and for the expeditious dispensation of justice. Therefore mere ignorance on the part of the respondents of stipulated timeframes for submitting application to court does not preclude this court 'ex mere motu' from taking cognizance of such delay which deviates from established procedure. Ignorant about the delay, it does not mean that this Court on its own cannot take notice of such delay. Court will jealously guard its procedure.
- [8] As observed in **Bachu Lal v Viraj Lal Bhindi** (1990) ABU 1/90, "*No appeal is pending as the applicant is yet to properly seek and obtain leave of this Court to file Notice of Appeal out of time. Until the applicant does this, and is granted leave he is deemed to have lost his right of appeal. The purported notice of appeal filed out of time without leave cannot at this stage be treated in law as a Notice of Appeal*", thus dismissed.

[9] The facts of the instant case bear a striking similarity to the above case and hence on grounds expounded in Bachu Lal (*supra*) the matter at hand also has to be dismissed. This court is appraised of the judgment of **NLTB v Ahmed Khan and Another**; CBV 002.2013I) where His Lordship, Gates, P Honourable the Chief Justice, laid down certain guidelines to ensure that a principled approach to the exercise of judicial discretion in applications of enlargement of time within which to lodge a petition for special leave as follows-

- i) *The reason for the failure to file within time.*
- ii) *The length of the delay.*
- iii) *Whether there is a ground of merit justifying the appellate court's consideration.*
- iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
- v) *If time is enlarged, will the Respondent be unfairly prejudiced?*

[10] However, the instant case stands distinguished from the NLTB case, as there is no application for enlargement of time at all and the parties maintained silence on the issue of delay whereas the guidelines laid down in the NLTB case are in relation to the application for the enlargement of time and not in relation to appeals where the Appellant has not made any application for leave to appeal out of time. Therefore the two cases are clearly distinguishable.

[11] In the instant case we noticed scant respect by the appellant for the procedures not only because he had not filed the appeal within the stipulated time but also he had not troubled himself to apply subsequently for leave of court for enlargement of time. Hence the silence of parties cannot take away the right of Court to deal with a matter of flagrant violation of the rules of Court. Not only the appellant failed to come before Court within the appealable period but also he did not have the basic courtesy to apply for leave out of time. Therefore in reality, there's no appeal before court, for me to consider.

- [12] This finding of Court is adequately endorsed by his Lordship Gates P in **NLTB v Ahmed Khan and Another** where he opined that “*As the time limits for appeal arise from a statutory framework providing for appeal within certain limits. They are not modifiable by consent of the parties the petitioner must bring him or herself within the rules in order to initiate a valid appeal*”. [As observed by His Lordship, Gates, P in **NLTB v Ahmed Khan and Another** (*supra*)]. Further the Court is fortified by the endorsement of Hickie J A in **Rupeni Silimuana Momoivalu v Telecom Fiji Limited** ABU 37/060 when his Lordship observed that “*the court expects time limits to be observed*”.
- [13] Eichelbaum, JA in **Air Pacific Limited v Lice Elenivula Saumi** [2002], ABU 1E/02. observed that “*Extension is entirely within the Court’s discretion which has to be exercised according to the facts of the case.*” There is no application for extension before court for the Court to use its discretion in the instant case.
- [14] In conclusion as the appellant has not filed and served the notice and grounds of appeal within the stipulated time, the appeal has to be dismissed. Therefore I dismiss the appeal and order the parties to bear their own costs in this Court and the Court below. In view of the above, unlike in an application for leave to file an appeal out of time I do not see any need to lend our minds to the merits or substantive issues in this case.

Seneviratne, JA

- [15] I agree with the reasoning and conclusion of Lecamwasam JA.

The Orders of the Court are:

1. *Appeal dismissed.*
2. *Parties to bear their own costs.*

S. Chandra

Hon. Mr. Justice S. Chandra
JUSTICE OF APPEAL



S. Lecamwasam

Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

L. Seneviratne

Hon. Mr. Justice L. Seneviratne
JUSTICE OF APPEAL