

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

CIVIL APPEAL NO. ABU 79 OF 2017
(High Court HBC 307 of 2006 at Lautoka)

BETWEEN : **AJAY RANIGA** and
KAVILA RANIGA

Appellants

AND : **J.K. BUILDERS LIMITED** and
SHARMA ARCHITECTS DESIGN GROUP LIMITED

Respondents

Coram : **Calanchini P**

Counsel : **Mr N Kumar for the Appellants**
Ms A Swamy for the First Respondent
Mr R Vananalagi for the Second Respondent

Date of Hearing : **22 January 2019**

Date of Ruling : **5 February 2019**

RULING

[1] This is an application by the Second Respondent (Sharma Architects) for an order that the notice of appeal filed on 28 June 2017 be struck out on the grounds that it has been filed

and served out of time. The application was made by summons filed on 25 July 2017 and supported by an affidavit sworn on 24 July 2017 by Vijay Sharma. The application was opposed by the appellants who relied upon an affidavit sworn on 25 August 2017 by Ajay Raniga. The First Respondent (J.K. Builders) supported the application and filed written submissions. The appellants and Sharma Architects also filed written submissions prior to the hearing of the application.

- [2] The application is made pursuant to section 13 of the Court of Appeal Act. Section 20(1) of the Act gives to a Judge of the Court of Appeal power to strike out an appeal.
- [3] At the hearing of the application two preliminary issues were raised by Counsel for Sharma Architects. The first issue was that the authorization referred to in the affidavit of Sangeeta Devi sworn on 25 August 2017 was not annexed to that affidavit. The purpose of Devi's affidavit was to provide a scanned copy of the original affidavit sworn by Ajay Raniga. The authorization related to the authority to file the original affidavit upon receipt of the same. The authority was an implied authority from Ms. Devi's employer and did not require a written authorization to perform a task that was clearly within the scope of her employment.
- [4] The second issue related to the fact that a copy of the original affidavit with the signature of the deponent had not been served on the legal representative acting for Sharma Architects although it had been filed. To overcome that issue a copy was served in court. Counsel for Sharma Architects accepted that the document was a true copy of the scanned copy.
- [5] The principal issue is whether the notice of appeal was filed and served within the time prescribed by Rule 16 of the Court of Appeal Rules. It was accepted that the judgment delivered by the High Court on 17 May 2017 was a final judgment. As a result the appellants were required to both file and serve the notice of appeal within 42 days from 17 May 2017. In other words, filing and service were required to be effected by 28 June 2017. The appellants filed the notice of appeal on 28 June 2017 but service was not

effected until 5 July 2017. As a result there was non-compliance with Rule 16 and consequently no appeal properly before the Court.

[6] In error the appellants subsequently filed a fresh notice of appeal on about 17 July 2017 pursuant to Rule 17 of the Rules. However Rule 17 does not apply in this case since there was no appeal before the Court to which Rule 17 applied. The proper course for the appellants was to apply for an enlargement of time under Rule 27 of the Rules: See **Kumar -v- Wati** [2014] FJCA 139; ABU 11 of 2014, 1 September 2014.

[7] As the appellants have not sought an enlargement of time to file and serve the notice of appeal that was filed on about 17 July 2017 it must be struck out since there was no right to file such a notice without having first obtained an order granting an enlargement of time to do so.

[8] There are two further matters that must be briefly mentioned. The first is the explanation offered by the appellants for having proceeded to file the second notice of appeal on 17 July 2017. That reason relates to advice received from the Court of Appeal Registry. There is reference to this matter in paragraph 3 of the supporting affidavit. Whatever the advice given by the Registry, the fact remains that the Rules are quite clear. Rule 16 requires both filing and service to be effected within time. Rule 17(2) only permits a fresh notice of appeal to be filed in the event that there is non-compliance with Rule 17(1). Rule 17(1) had not been activated since there was no appeal properly before the Court. This should have been brought to the attention of the Registrar on the return of the summons to fix security for costs.

[9] The second issue concerns the procedure followed by the appellants by commencing the appeal process in this Court. At the hearing of the action there was no appearance by the defendants who are the appellants in this appeal. Under those circumstances and pursuant to Order 35 Rule 2 of the High Court Rules, the correct procedure was to apply to have the judgment set aside and to ask for a re-hearing: See **Mishra -v- Director of Public Prosecutions** [2012] FJCA 40; ABU 50 of 2010, 8 June 2012.

Orders:

1. *Notice of Appeal filed on 17 July 2017 is struck out.*
2. *Appellants are ordered to pay costs to the Second Respondent in the sum of \$2500.00 and to the First Respondent in the sum of \$500.00 within 28 days from the date of this Ruling.*



W. Calanchini

Hon Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL