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

CIVIL APPEAL NO. ABU 051 of 2019
(Suva High Court Civil Action No: HBC 196 of 2014)

BETWEEN : **MOHAMMED SHAFIQ**

Appellant

AND : **1. ANTHONY MARK VALENTINE**
2. SHAINAZ ZAREENA BIBI VALENTINE

Respondents

Coram : **Almeida Guneratne, JA**

Counsel : **Mr A K Singh for the Appellant**
Mr S Singh Respondents

Date of Hearing : **30th October, 2020**

Date of Ruling : **8th December, 2020**

RULING

[1] This is an application by the Respondent to strike out the Appellant's appeal which is pending before the full Court.

[2] (Mr) S. Singh on behalf of the Respondent sought pre-audience to make submissions since his striking out application has been set for hearing today (30th October).

[3] At the commencement of the hearing, I posed the question whether, when an appeal is pending before the full Court, a single judge of the Court of Appeal could entertain a striking out application in as much as, to my mind, it appeared to be an intrusion on the

jurisdiction of the full Court pre-empting whatever matter that ought to be taken before the full Court. Consequently, the question I was faced with was whether I, as a single judge had jurisdiction to hear and determine a striking out application when "*the appeal*" against the judgment in issue of the High Court is pending before the full Court.

[4] In the course of submissions (Mr) S. Singh in response to my said concerns submitted that:

(i) there is a ***cursus curiae*** of this Court (**including some of my own Rulings**) where striking out applications before a single judge had been entertained pending the hearing of an appeal before the full Court.

(ii) although there is no specific provisions in the Court of Appeal Act vesting jurisdiction on a single judge, the High Court Act and Rules taken with the Amendment of 2006 made thereto, read with Rule 6 of the Court of Appeal Rules, a single judge must be regarded as having jurisdiction.

[5] (Mr) A.K. Singh for the Appellant having agreed with what (Mr) S. Singh for the Respondent submitted (as re-capped in paragraph [4] above) settled down to respond to (Mr) S. Singh's submissions on why his striking out application ought to be rejected for different reasons.

[6] Consequently, the jurisdiction issue was allowed to rest.

Basis for the striking out application – (Mr) S. Singh's submissions

[7] (Mr) S. Singh for the Respondent submitted that:

(i) antecedent to the present matter there had been (as the Record reveals) a number of interlocutory orders made by the High Court finally culminating in the impugned order/Judgment of the High Court dated 23rd May, 2019, (which he submitted) is also interlocutory in nature;

(ii) he was relying on the authoritative precedents such as *inter alia* **White –v- Brunton** (1984) QB 570 and **Gounder v Minister of Health** [2008] FJCA 40;

(iii) consequently, the impugned judgment of the High Court being of an interlocutory nature, the Appellant was required to have first sought leave to appeal which the Appellant has failed to do.

Appellant's submissions in Counter

[8] (Mr) A.K. Singh in Counter submitted that:

(i) matter of the Appeal before the final Court being one arising in the context of a Sale and Purchase Agreement where specific performance had been allowed in favour of the Respondent, as far as the Appellant was concerned, the "*suit was at an end"* and,

(ii) accordingly, whether on the application or the order approach, the Appellant was entitled to appeal against the impugned judgment of the High Court on the basis that it was "*final*," in support of which argument Counsel relied on the Full Court decision in **Gaya Prasad (etal) v. Aron Adarsh Jivaratnam & Anor**. (ABU 116 of 2016, 28th February, 2020) and the single judge ruling of mine in **Vikunavanua v. Vunamoli** [2020] FJCA 65.

Respondent's submissions in Reply

[9] In his reply (Mr) S. Singh submitted that,

(i) after specific performance was allowed in the Respondent's favour since the Master's decision in 2015, the Respondent is living in the premises in question paying rents as well,

(ii) the Appellant has since then been sleeping over whatever rights he might have had and,

(iii) the Appellant's conduct as highlighted by the High Court Judge is inexcusable

(iv) therefore, the Respondent was entitled to seek a striking out application under Section 12(2)(f) of the Court of Appeal Act.

Consideration and Assessment of the rival submissions made by respective Counsel

[10] I began by first looking at the impugned Order/Judgment of the High Court dated 23rd May, 2019.

What the High Court held

[11] The Judgment of the High Court commences by stating that, "*The Master had granted summary Judgment on 28.05.2015. The cause of action related to a transfer of land and specific performance was sought and in Summary Judgment it was allowed."*

[12] Having said so, His Lordship in his analysis of the antecedent factual content proceeded to reflect thereon and made the ensuing orders:

> *"2. The Defendant had already exercised his right of appeal and when the matter was fixed for hearing before Justice K. Kumar (as he then was) it was withdrawn by the then solicitors for the Defendant. The appeal against Master's decision of 28.5.2015 was dismissed and struck off.*
>
> *3. So the Defendant had already exercised his right of appeal and it was dismissed without consideration the merits. There is no explanation as to why it was withdrawn on 23.09.2015 having taken all the steps stipulated by High Court Rules of 1988.*
>
> *4. If the Defendant failed to comply with the provisions contained in the High Court Rules of 1988 to diligently prosecute the appeal, a legal fiction is found in Order 59 rule 17(3) of High Court Rules of 1988 which makes the appeal deemed abandoned. This is to stop abuse of process through inaction of the appellants to clog appeals unnecessarily. Such legal fiction also grants clarity and finality to a decision of the court made by Master. Certainty of a decision of court subject to appeal is a requirements of due process. But this does not allow to make an appeal and withdraw the appeal at hearing and again seek to appeal after 4 years.*

5. *Once an appeal was made and it was fixed for hearing the appellant had already exercised the right of appeal granted by the High Court. If the appeal was withdrawn without any reason, it is presumed that Defendant's solicitors at that time considered the pros and cons of the prospects of appeal and withdrew it on the advice of the client. In such a situation Defendant should not be allowed to abuse the process and file a fresh appeal without a valid reason. So application for extension of time to file and serve notice of appeal should be dismissed in limine.*

6. *Defendant having exercised his right of appeal and having withdrawn the appeal at the hearing on 23.09.2015, should not be allowed to bring another appeal, without a valid and cogent reason, approximately after 4 years from the said withdrawal by the then solicitors. In the affidavit in support there is no such reason given. This application is nothing short of abuse of process for delay and or to cast uncertainty as to the decision of court.*

7. *If this practice is allowed it will pave way for abuse process. High Court Rules of 1988 specifically prevented such abuse when it created a legal fiction by introduction of 'deeming' provision to make any unprosecuted appeal is deemed abandoned.*

8. *Already execution of the decision of Master was also granted, as the application for stay of the said execution was also refused by Justice K. Kumar (as he then was). A party who has deep pockets should not be allowed to come again and again on same matter.*

9. *There is approximately 4 year delay in this application from the date of Master's decision of 28.5.2015. Even if one were to calculate date from withdrawal of the appeal on 23.9.2015 delay is more than 3 years and 8 months, and the delay is inordinate and summons for extension of time needs to be struck off, without valid reason for such a long time.*

10. *Even if I am wrong on the above. There is no explanation of that delay by Defendant in the affidavit in support. In consideration for extension of time there should be an explanation as to the delay. When there is no explanation evident on the record or in the affidavit in support no extension can be granted.*

11. *Order 59 rule 10 of High Court Rules of 1988 states:*

    1) *An application to enlarge the time period for filing and serving a notice of appeal or cross appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.*

2) An application under paragraph (1) shall be made by way of an inter parte summons supported by an affidavit.

12. So, where a party had not filed a Notice of Appeal within the time period stipulated in Order 59 rule 9 of the High Court Rules of 1988 may make an application for enlargement of time in terms of Order 59 rule 10(1) of the High Court Rules of 1988. Once a Notice of Appeal is filed within the time period and appeal proceeded to hearing, there is no issue of enlargement of time to file a second Notice of Appeal.

13. High Court Order 59 rule 17 lays down the procedure regarding an appeal from the Master and it states as follows:

Order 59 rule 17

(1) The appellant shall upon serving the notice of appeal on the party or parties to the appeal file an affidavit or service within 7 days of such service
(2) The appellant shall within 21 days of the filing of notice of appeal, file and serve a summon returnable before a judge for directions and a date for the hearing of the appeal
(3) If this rule is not complied with the appeal is deemed to have been abandoned.

14. In my judgment the appeal is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules in terms of the legal fiction, prevents fresh application being made. Any other interpretation would make 'deeming provisions' contained in Order 59 rule 17(3) redundant and superfluous.

15. This application for extension of time can be rejected on case management ground as well. Once a party had exercised right of appeal and withdrawn the appeal and had taken various other steps, after withdrawal, as in this case the right to appeal is already exhausted and question of a second notice of appeal will not arise.

16. After failure of all such avenues again the same party cannot be allowed to seek extension of time to file second notice of appeal, after lapse of 4 years thus allowing uncertainly eroding finality of decision of the court, which had already been executed. If this is allowed a party can abandon any appeal at hearing and re-start the process again thus wasting time and money of the parties and time and resources of the court.

17. There is no provision in High Court Rules to allow unlimited appeals against an order of the court, if this is allowed any decision of the court will be open for challenge at any time that will erode finality to a decision made 4 years ago and also already executed.

18. The rules of the court and procedural laws are all made for smooth functioning of the court system and also to provide optimum utilization of time and resources of the court in expeditious manner.

19. In my judgment the effect of Order 59 rule 17(3) of High Court Rules of 1988, is that no fresh application for enlargement of time to file a Notice of Appeal regarding the same decision be logically allowed. If allowed it would create a mischief to the 'deeming provision.' Such an interpretation is not preferred. Whether the party had abandoned the appeal midway or withdrawn at the hearing unlimited number of notice of appeals cannot be made.

20. It should also be noted the contextual interpretation of the Order 59 rule 17(3) of High Court Rules also supports that no application for enlargement of time for a second Notice of Appeal, be allowed when an appeal is already withdrawn.

21. So in my judgment the application for enlargement of time to file second Notice of Appeal against the Master's decision should be struck off in limine without considering the merits as there is no provision in the High Court Rules of 1988 when the appeal was struck off and dismissed. Defendant had taken steps in the case after dismissal for over 3 years and having failed all of them he cannot be allowed to make a fresh appeal. This application is abuse of process and Plaintiff is awarded a cost of $1,250, summarily assessed, to be paid by the Defendant."

[13] I could not find any basis to fault the learned High Court Judge's said analysis, reasoning and Orders. However, I felt it was incumbent on my part to have regard to the final effect of the Orders made, whatever may have been the antecedent history behind it.

[14] In that regard, I hark back to what I said in a recent Ruling of mine in **Orisi Vukinavanua v Vunamotu & Others** [2020] FJCA 65; ABU003.2020 (29 May 2020).

[15] Therein I said that,

> ***"****[19] Lord Denning's remarks on the aforesaid approaches when he said: "This question of 'final 'or 'interlocutory' is so uncertain that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point." (vide:* ***Salter Rex v. Ghosh****) [1971]2QB 597 at 601).*

> *[20] I had on an earlier occasion also expressed the thinking reflected above.*
>
> *[21] However, I did have regard to the decision in **Miller v National Bank of Vanuatu** referred to in the list of authorities tendered on behalf of the 2nd to 4th Respondents, notwithstanding which I hold the view (agreeing with the Appellant's contention) that, once a claim of a substantive nature is struck out totally, the suit had been brought to an end."*

Some reflections on the rival stands taken by Counsel and comments thereon

[16] In regard to (Mr) A.K. Singh's reliance on the full Court decision in Gaya Prasad (etal) (supra), (Mr) S Singh brought to my attention that, that decision is presently before the Supreme Court in appeal.

[17] Whatever the relative hopes as to what may be the outcome of the Supreme Court decision, it lies in the area of surmise in so far as the present application is concerned.

[18] For the aforesaid reasons, I hold that, the Appellant was entitled to appeal the impugned judgment of the High Court without first seeking leave to appeal and accordingly I reject the Respondent's contentions in that regard, holding as I do that, the impugned decision of the High Court had a final effect on the rights of parties and therefore was not interlocutory.

The Test for determination whether a decision is interlocutory or final

[19] In my view, it is that final effect as I have articulated above, whether on the application or the Order approach.

[20] While I have proceeded to conclude the matter before me, (as a single Judge), however, given the question that keeps on recurring like a decimal, I would welcome the day the Supreme Court finally makes a determination on the said aspects of the Application and/or the Order test in determining whether a matter is to be regarded as interlocutory or final

giving its mind to the final impact on the rights of parties. I say this having regard to the fact that, the oft quoted decision in the Fiji judicial jurisprudence is a judgment of the Court of Appeal (vide: **Goundar –v- Minister for Health** [2008] FJCA 40; ABU0075.2006S (9 July 2008).

[21] I say that on account of a further consideration, and that is, Section 98(6) of the Constitution of Fiji.

[22] In conclusion, as far as the present matter is concerned, I proceed to make my orders as follows:

Orders of Court:

1. *The Respondents striking out application is dismissed.*

2. *Parties may advise themselves to take whatever steps in consequence of Order 1 above as contemplated by law, that is to say, the applicable provisions of the Court of Appeal Act (Cap.12).*

3. *Having regard to the intricacies involved in the matter at hand as articulated above in this Ruling, I make no order as to costs.*

4. *The Registrar is directed to have the Appeal already pending before the full Court on the substantive matter to list it for hearing on a date when the full Court is constituted.*

COURT OF APPEAL FIJI

Almeida Guneratne
JUSTICE OF APPEAL