

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Civil Action No. HBA 31 of 2011**

**BETWEEN** : **ROWENA GRACE CROSS** (also known as **Grace Bamlett**; also known as **Rowena Grace Raven Creek**) and **DOUGHLAS BAMLETT** both of Ocean Pacific Road, Wainadoi, Navua in the Republic of Fiji and both now permanently residing in the United States of America.

*Appellants/Defendants*

**AND** : **DIANA GIESBRECHT** of Qrts 252 Barker Place, Muanikau, Suva in the Republic of Fiji, Domestic Duties.

*Respondent/Plaintiff*

**Counsel** : **MR FA S. of Fa & Company** for the **Appellants/Defendants**  
**MR RAYAWA A. of Rayawa Law** for the **Respondent/Plaintiff**

**Date of Judgment:** 5<sup>th</sup> November, 2013

## **JUDGMENT**

1. Summons (for Leave to Appeal an Interlocutory Order) was filed on 7<sup>th</sup> August 2012 by the Appellants/Defendants against the order delivered by this court on 17<sup>th</sup> July 2012 and sought the following orders:

- (i) **FOR AN ORDER** that the Appellants/Defendants do have leave and be at liberty to lodge an appeal against the decision of the Honorable Mr Justice Kotigalage delivered on the 17<sup>th</sup> of July 2012;

- (ii) **FOR AN ORDER** that a Stay of Execution is granted pending the determination of this appeal of the decision of the Honorable Mr Justice Kotigalage delivered on 17<sup>th</sup> of July 2012;
  - (iii) **FOR AN ORDER** that a decision of the Honorable Mr Justice Kotigalage delivered on the 17<sup>th</sup> of July 2012 be wholly set aside;
  - (iv) **AND FOR A FURTHER ORDER** that the Costs of this Appeal be paid by the Respondent/Plaintiff to the Appellants/Defendants; and
  - (v) **FOR SUCH FURTHER ORDERS** as this Honorable Court deems just.
2. The Appellants/Defendants deposed an Affidavit in Support dated 7<sup>th</sup> August 2012 through Thomas Wong Junior, Law Clerk of the Solicitors for the Appellants/Defendants in support and stated inter-alia:
- 2.1 The Affidavit was filed in support of the summons against the decision of this court delivered on 17<sup>th</sup> July 2012 in High Court Action No. HBA 31 of 2012 (Decision annexed marked as “TJ1”).
  - 2.2 The brief background of the case was described in paragraph 4 (a) to 4 (g).
  - 2.3 Grounds of appeal were detailed in the proposed Notice of Appeal annexed to the Affidavit marked as “TJ2” to the Affidavit.
  - 2.4 It was deposed that basis of the decision in this matter which was proposed in appeal set out in the paragraph 4 of decision dated 17<sup>th</sup> July 2012 in it was stated in paragraph 4 of the said decision:  
  

*“Subsequently, the present case was filed by the Defendant Appellants tendering summons titled “Seeking Leave to Appeal an Interlocutory Order of the Master” without mentioning the relevant High Court Rule. “In my view solicitor deliberately used the title to abuse the process of the court”.*
  - 2.5 It was further stated the court had failed to take the following matters into account:

- (a) *That this was an application by the Appellants/Defendants to appeal against the Interlocutory Order of the Master delivered on the 6<sup>th</sup> of October 2011;*
- (b) *That owing to an oversight and a typographical error, the Appellant/Defendant had used Order 59 Rule 8(1) of the High Court Rules 1988 instead of Order 59 Rule (8) 2 of the High Court Rules 1988 in the summons;*
- (c) *This defect was not picked up by the Solicitors for the Appellants/Defendants until notification was received from the Respondent/Plaintiff's Solicitors;*
- (d) *That due to this irregularity, the Appellants/Defendants' Solicitor then sought the Leave of the Honorable Court to have this defect cured pursuant to Order 2 Rule 1(1) of the High Court Rules 1988;*
- (e) *That the substance of the Appeal clearly pointed to the fact that this Appeal was against an Interlocutory Order of the Master;*
- (f) *That there was no evidence before the Court to point to the fact that the Appellants/Defendants' Counsel was in fact trying to mislead the court.*

2.6 It was deposed that this court erred in fact and in law in the decision of 17<sup>th</sup> July 2012 by finding that the Defendants tried to mislead the court by filing summons on already abandoned appeal and that such conduct was an attempt to mislead the court was a misconduct on the part of the Defendant's solicitor for the following reasons:

- (a) *That following the Master's Orders of the 6<sup>th</sup> of October 2011, the Appellants/Defendants appealed such orders by filing its Notice of Appeal on the 17<sup>th</sup> of October 2011;*
- (b) *That the Notice of Appeal was served at the Office of the Counsel for the Respondent/Plaintiff on the 17<sup>th</sup> of October 2011;*

- (c) *That pursuant to Order 59 Rule 17(2) of the High Court Rules 1988, the Appellants/Defendants were to have filed and served a Summons returnable before a Judge within 21 days of the filing of the Notice of Appeal;*
- (d) *That the requisite period of filing the Summons expired on the 7<sup>th</sup> of November 2011;*
- (e) *That owing to an oversight, the Summons was not filed;*
- (f) *That after a period of 3 months after the expiry of the time to file a Summons, the Appellants/Defendants were alerted to this oversight and omission wherein Counsel for the Appellants/Defendants then tried to file the Summons but the same was not accepted by the High Court Registry;*
- (g) *That on the 16<sup>th</sup> of March 2012, the High Court Registry sent a letter to the Appellants/Defendants' Counsel informing that the appeal had been deemed abandoned;*
- (h) *Subsequently, the Appellants/Defendants filed a fresh Notice of Appeal pursuant to Order 2 Rule 1(1) of the High Court Rules 1988;*
- (i) *That there was no evidence before the Court to point to the fact that the Appellants/Defendants' Counsel had in fact attempted to mislead the Court.*

2.7 The Appellants/Defendants stated, this court erred in law and in fact by finding the summons filed to extend the time to file a Notice of Appeal was frivolous, vexatious and without any basis for the following reasons:

- (a) *That the letter from the High Court Registry of the 16<sup>th</sup> of March 2012, confirmed that the appeal had been deemed abandoned;*

- (b) *That as the Appeal had been deemed abandoned, the merits of the same were not taken into account by the Honorable Court;*
- (c) *That as the merit of the Appeal had not been taken into account by the Honorable Court, the Appellants/Defendants prima facie had merits in submitting a fresh application;*
- (d) *That Order 2 Rule 1(1) of the High Court Rules 1988 permits the non-compliance with any provision of the High Court Rules.*

2.8 The Appellants/Defendants also stated that this court had placed heavy reliance on the Respondent's allegation that Mr I Fa was in overseas and that such absence should not be accepted as a valid ground to accept the default.

3. In response to the Affidavit of Appellants/Defendants the Plaintiff/Respondent filed her Affidavit dated 1<sup>st</sup> October 2012 and deposed inter-alia.

3.1 The Plaintiff/Respondent opposed to the entire content of the Affidavit of the Appellants/Defendants for the reason that by the said Affidavit was an attempt to complicate a very simple issue of law.

3.2 The Plaintiff/Respondent stated the Appellants/Defendants used the same proposed Notice and Grounds of Appeal used in the appeal hearing which is now subject to this appeal (T.J. 2 annexed to the Affidavit of Thomas Wong Junior's Affidavit).

3.3 It was stated Notice of Appeal lapsed but is now being brought again with the same content.

3.4 It was also stated the Respondent/Plaintiff is in agreement with the Judgment delivered by this court on 17<sup>th</sup> July 2013.

3.5 The Respondent/Plaintiff's counsel had advised her that the appeal is purely a legal issue and it will be addressed by him in his legal submissions.

- 3.6 The Plaintiff/Respondent also pleaded the application by the Appellants/Defendants should be dismissed and costs to be ordered to pay within 7 days and all other order issued to be enforced against the Appellants/Defendants.
4. On 18<sup>th</sup> September 2013, this court made directions, the Respondent/Plaintiff to file the Affidavit in Response within 14 days which was adhered to and if any reply by the Appellants/Defendants to file within 7 days and the hearing was fixed for 14<sup>th</sup> November 2012. The Plaintiff/Respondent filed her Affidavit within time but the Appellants/Defendants defaulted the directive issued and when the matter was called on 14<sup>th</sup> November 2012 for hearing, the Appellants/Defendants' counsel moved to file the Affidavit in reply which was objected by the Respondent/Plaintiff and this court held with the Respondent/Plaintiff and refused to grant leave to file the Affidavit in Reply by the Appellants/Defendants and matter was taken up for hearing.
5. Both counsel made oral submissions and the Respondent/Plaintiff filed the written submissions. Mr Fa. S. counsel for the Appellants/Defendants made submissions and stated:
- 5.1 The counsel sought orders on the summons filed on 7<sup>th</sup> August 2012 pursuant to Section 12(2) (f) of the Fiji Court of Appeal Act Chap 12, Order 45 rule 10 of the High Court Rules 1988.
- 5.2 The counsel stated he disagreed with the findings in paragraph 4 of the Judgment dated 17<sup>th</sup> July 2012 which states:

*“4. Subsequently, the present case was filed by the Defendants/Appellants tendering summons titled **“Seeking Leave to Appeal an Interlocutory Order of the Master”** without mentioning the relevant High Court Rule. **“In my view, the Solicitor deliberately used the title to abuse the process of this court”***

In this regard, I disagree with the argument which does not carry merits. The findings were made by this court in the Judgment dated 17<sup>th</sup> July 2012; on perusal of summons filed by the Appellants/ Defendants (*which was admitted by the*

*Appellants/Defendants in paragraph 7(b) of the Affidavit in Support dated 7<sup>th</sup> August 2012 sworn by Litigation Clerk Thomas Wong Junior of the Defendants/Appellants' Solicitors); which states:*

*“that owing to an oversight and a typographical error, the Appellants/Defendants had used Order 59 Rule 8(1) of the High Court Rules 1988 instead of Order 59 Rule 8(2) High Court Rules 1988 in the Summons”*

In this regard I find the Appellants/Defendants' counsel did not refer to the findings of the Judgment dated 17<sup>th</sup> July 2012 where the court had given due consideration to all aspects on this issue and it was not decided in isolation. I quote the following paragraphs of the Judgment:

**13.** Attention of the Court also drawn to the issue of whether Order 3 Rule 4(1) can be invoked to cure the procedural irregularity:

“Order 3 Rule 4 –

*(1) – The Court may, on such terms as it thinks just, by Order extend or abridge the period within which a person is required or authorised by these rules or by any Judgement, Order or direction to do any act in any proceedings;*

*(2) – The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period;*

*(3) – The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.*

*Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended whether by order of the Court or by consent a*

*later filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.*

**14.** When the above rule is examined, it cannot be applied to the present application by the Defendants Appellants for the reasons below:

- (a) *Delay in filing the appeal is not justified;*
- (b) *The appeal being abandoned;*
- (c) *The Defendants Appellants summons states :*

*“For an order that the time within which a Notice of Appeal is to be filed be extended to allow the Defendants Appellants to lodge an appeal against the Decision of the Master, Mr Amaratunga delivered on the 6<sup>th</sup> of October, 2011”*

In my view, Order 3 Rule 4 does not provide any right to the Defendants Appellants to file 2<sup>nd</sup> Notice of Appeal when the appeal was abandoned and having not taken steps to file the appeal in pursuant to Order 59 Rule 8(2).

**15.** It is admitted by the Defendants Appellants (para 10 of the affidavit), the summons were not filed owing to an oversight. Merely stating that it was an oversight won't justify the delay and I hold Defendants Appellants failed to substantiate the claim of oversight. In this regard, I quote the decision of Justice Calanchini in the case of ***A Mithcell Gay and Allan C Beall v Resolution Trust Corporation, The Cadle Company, Leinani Bortels and Lynel Bortels*** [2010] HBA 1/095 (Apf) HBC 458/93, (Order 59 Rule 17 (1); (2) and (3):

*“Application for Leave must be filed within 14 days of the delivery of an Order or Judgement. By imposing strict time table the Rules avoid delay at the interlocutory stage of civil proceedings and to make such appeal more efficient Rule 17(3) rule that failure to follow Rule 17(1) and 17(2) leads to an automatic abandonment of an appeal is intended to operate as a deterrence. Appeal 11*



*days out of time, without application to enlarge time, or timely filing of Summons for directions, and absent explanation for non-compliance with rules is deemed abandoned. Leave to appeal is dismissed with costs”.*

**The above paragraphs clearly explains that the court had given due consideration to the issues raised by the Appellants/Defendants.**

5.3 The Respondent/Plaintiff’s counsel had raised the issue of abandonment of the Appeal. It was submitted that the Notice of Appeal filed on 17<sup>th</sup> July 2011 by the Appellants/Defendants and it was in breach of Order 59 Rule 17(2) and Order 59 Rule 17(3) automatically applied by operation of law, I agree.

5.4 The Appellants/Defendants had sought by their summons filed on 4<sup>th</sup> April 2012:

*“For an order that the time within which a Notice of Appeal is to be extended to allow the Appellants/Defendants to lodge an appeal against the decision of the Master Mr Amaratunga, delivered on the 6<sup>th</sup> of October 2011;*

*For an order that the decision of the Master Mr Amaratunga, on the 6<sup>th</sup> of October 2011 be wholly set aside.”*

**This court delivered its judgment on 17<sup>th</sup> July 2012 and found the application was abuse of process of the court. It is evident that the Appellants/Defendants had filed a Notice of Appeal within time but failed to comply with Order 59 Rule 17(2) which states:**

*”17(2) The Appellant **shall** within 21 days of the filing of Notice of Appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal emphasis the word “shall” and it is mandatory requirement.”*

**In this context the Appellants/Defendants cannot seek redress under Order 3 Rule 4(1) as stated in paragraph 13 of the Judgment. The Order 59 Rule 17(3) provides:**

*“(3) If this rule is not complied with, the appeal is deemed to have abandoned”.*

The abandonment of the appeal was informed to the Appellants/Defendants by the High Court Registry on 16<sup>th</sup> March 2012 on the direction of the court. (*Annexure “DG-B” to the Affidavit of the Respondent/Plaintiff filed on 12<sup>th</sup> April 2012*) which states the Notice of Appeal was filed on 14<sup>th</sup> December 2011 and failed to take further steps within 21 days as stipulated in Order 59 Rule 17(2) and it was informed pursuant to Order 59 Rule 17(3) the appeal was abandoned.

The Appellants/Defendants couldn't justify the delay and the Judgment was delivered on 17<sup>th</sup> July 2012 by this court after considering all material placed before the court. The material submitted to the court to explain the delay was found to be falsehood as explained in paragraph 12(a) and (b) which I quote below:

**“12.** It is important note statements made in the Affidavit of Plaintiff Respondent (paragraph 21 to 36) and I observe the following:

*(a) That the Defendants/Appellants had failed to divulge any material evidence to prove which date Mr I Fa left the country. In absence of such evidence, mere statement of Mr I Fa was away in overseas cannot be considered as a valid ground to accept the default. I specifically refer to paragraph 27 of the Affidavit of Plaintiff Respondent and the annexure marked “DG-E”. it clearly indicates that Mr I Fa had left the country on 15<sup>th</sup> September 2011 and it was 7 days after the affidavit was due to file. This position was never rebutted by the Defendants/Appellants and I concede that the Defendants/Appellants had intentionally avoided to submit evidence of the date of departure of Mr I Fa. It is deliberate suppressing of facts by the Solicitor for the Defendant/Appellant. It is also my view that the Defendants/Appellants' Counsel/Solicitor had not come to this court with clean hands and his conduct is highly questionable.*

*(b) Further the statement made by the Defendants/Appellants in para 7(c) (2) of the Affidavit on “19<sup>th</sup> of August Mr I Fa was away, is deliberate falsehood by the Defendants/Appellants with the available material, I am convinced that Mr I Fa left the country on 15<sup>th</sup> September 2011.*

*(c) It also stated in the Affidavit of the Defendants/Appellants and the counsel/solicitor could not obtain the instructions the Defendants/Appellants were in overseas. Master had scheduled a time table for the matter giving specific dates and I concede that Defendants/Appellants’ Solicitor had adequate time to file the Affidavit since Defendants/Appellants left the country before that.*

*(d) The Defendants/Appellants position that voluminous amounts of material contained in the Affidavit of Plaintiff Respondent cannot be considered as reason to vacate the hearing date. It is the duty of the Solicitor to make arrangements to file the necessary papers in time.”*

The above findings justify that there was a clear case of abuse of the process of the court.

5.5 As cited by the Respondent/Plaintiff’s counsel, I quote the case of ***Reserve Bank of Fiji v. Gallagher*** [2006] FJCA 37. It was considered that relitigating issues will definitely amount to an abuse of process. For the 2<sup>nd</sup> time now the Appellants/Defendants attempt to relitigate the same issue without a basis. In the said case Fiji Court of Appeal cited Lord Bingham’s statement in the case of ***Johnson v. Gore Wood & Co.*** [2000] UKHL 65; [2001] 1All ER 481:

*“...The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a*

*claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding, involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is missing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus, while I would accept the lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. **While the result may often be the same, it is my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by***

*special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.”* (emphasis added)

The above statement clearly explains the abuse of process of the court, the principles adopted are applicable to this matter and there no merits to consider the summons filed on 7<sup>th</sup> August 2012. Further, I conclude summons filed in this case an unsuccessful attempt to reopen the already abandoned appeal by circumventing the High Court Rules 1988.

5.6 Accordingly, I conclude there is no merit in the application and the Defendants/Appellants failed to justify the orders sought.

Accordingly, I make the following **Orders**:

- (a) *Summons filed on 17<sup>th</sup> August 2012 dismissed;*
- (b) *Appellants/Defendants are ordered to pay costs of further \$2,500 summarily assessed further to the costs ordered by the Learned Master, confirmed by this court and the costs ordered by this court by its decision dated 17<sup>th</sup> July 2012.*

**Delivered at Suva this 5<sup>th</sup> Day of November, 2013.**



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**C. Kotigalage**

**JUDGE**