

IN THE HIGH COURT OF FIJI
[WESTERN DIVISION] AT LAUTOKA
CIVIL JURISDICTION

Civil Action No.: HBC 73 of 2009

BETWEEN: **MICHAEL'S TAXIS & TOURS LIMITED** a limited liability
company registered under the provisions of the Companies Act
Cap 247 and having its registered office at Sharma Street, Narewa
Road, Nadi.

**APPLICANT/APPELLANT/
ORIGINAL 2ND DEFENDANT**

AND: **INDAR KIRAN also known as INDRA KIRAN** of Korotogo,
Sigatoka, Domestic Duties.

**1ST RESPONDENT/
ORIGINAL PLAINTIFF**

A N D: **ANIL KUMAR** of Nasoso, Nadi, Driver.

**2ND RESPONDENT/
ORIGINAL 1ST DEFENDANT**

Appearances: Ms. Doton B for Appellant (Applicant)
Ms. Swamy for 1st Respondent

Date of Hearing: 21st November, 2014

Date of Judgment: 2nd December, 2014

J U D G M E N T

1. **Introduction**

1.1 The Applicant by way of Summons dated 14th April, 2014 has prayed for
the following orders:

- (a) An **ORDER** that leave be granted to the Appellant/Original Second Defendant to file Notice of Appeal out of time against the Interlocutory Judgment of the Master of the High Court, Mr Mohammed Ajmeer delivered on the 3rd day of March, 2014.
 - (b) An **ORDER** that the execution and/or enforcement of the said Interlocutory Judgment of the Master of the High Court Mr. Mohammed Ajmeer delivered on the 3rd day of March, 2014 be stayed until the determination of this Application and the Appeal.
 - (c) An **ORDER** that there be a Stay of Execution of the Default Judgment obtained on the 23rd day of June, 2010 and dated the 29th day of June, 2010 pending the determination of this Application and the Appeal.
 - (d) An **ORDER** that costs of this application be costs in the cause.
 - (e) Any other Orders.
- 1.2 The application is supported by an Affidavit sworn by Michael Fench the Managing Director of the Applicant Company/Original Second Defendant on 14th April, 2014.
- 1.3 In his Affidavit he has deposed inter-alia;
- (i) That the 1st Respondent (Plaintiff) instituted proceedings against the Defendant Company in High Court Civil Action No. : HBC 73 of 2009 on 15th May, 2009 and on 29th June, 2010 a Default Judgment was entered against the Company.
 - (ii) That sometime on or about July 2012 a Deputy Court Sheriff from Lautoka High Court came to the business premises of the Company and advised that he was taking an inventory of the Company vehicles. Prior the said Deputy Sheriffs' visit they did not have any knowledge of the action at all.
 - (iii) That on 2nd August, 2012 his Solicitors filed an application to set aside the default Judgment dated 29th June, 2010 and the

subsequent Order made by the Master of the High Court on 24th October, 2011.

- (iv) That the setting aside application was heard on 25th October, 2013 and the Ruling was delivered on 3rd March, 2014 whereby the Master of the High Court dismissed and struck out the Companies application to set aside the default Judgment and the subsequent Order granted on 24th October, 2011.
- (v) That he is advised by his Solicitors and he verily believes that despite the Ruling being delivered on 3rd March, 2013 his Solicitors did not receive the copy of the transcript until 6th March, 2014 after several attempts by his Solicitors' City Agents to collect a copy of the same from the High Court Registry.
- (vi) That thereafter he could not attend his Solicitors office to provide instructions due to work commitments and he was required to do a job for the Company in Suva and he was out of town for a few days.
- (vii) That furthermore he had a criminal matter pending at the Nadi Magistrate Court which required him to undergo a psychological evaluation and he had an appointment at the Lautoka Hospital on 3rd March, 2014, however it was re-scheduled to the 10th May, 2014.
- (viii) That he attended the Lautoka Hospital on the 10th March, 2014 however he was informed that he had to return on 12th March, 2014 due to the appointment being re-scheduled.

1.4 The 1st Respondent (Original Plaintiff) has filed an Affidavit in Reply sworn by her on 20th May, 2014 opposing the application of the Applicant.

1.5 Applicant has filed an Affidavit in Reply to the Affidavit of the Respondent sworn by its Managing Director on 2nd July, 2014.

- 2. It is admitted by the applicant in his written submissions that the Order which the applicant seeks to appeal out of time is interlocutory in nature therefore leave of the Court ought to be obtained before a Notice of Appeal can be filed.

3. The Law

3.1 Order 59 Rule 11 of the High Court Rules provides as follows:

“Any application for leave to appeal an Interlocutory Order or Judgment shall be made by Summons with a supporting Affidavit, filed and served within 14 days of the delivery of the Order or Judgment”.

3.2 In this matter the Applicant filed the present application for appeal out of time on 15th April, 2014, delay of about one month from when leave to appeal ought to have been filed.

3.3 *In Avery v No. 2 Public Service Appeal Board and Others (C.A.) 2 NZLR [1973] 86 at 90* Richmond J said :

“When once an Appellant allows the time for appealing to go by then his position suffered a radical change whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the Judgment from which he wishes to appeal”.

3.4 As stated in the above Judgment it is clear that the onus is on the Applicant to prove that justice of the case requires that he be given an opportunity to file an Appeal out of time.

3.5 The factors the Court should consider in exercising the discretion to allow an appeal out of time are laid down in several authorities. *In NLTB v Khan[2013] FJSC 1 CBV 0002 2013 (15 March 2013)* the factors to be considered in this type of applications are stated as follows:

- (i) The reason for 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 a substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced.

4. Length of Delay

- 4.1 As stated in paragraph 3.2 hereof the Applicants delay in making this application is about one month.
- 4.2 In *R v Rhodes (1910) 5 Cr App. 35* a months' delay was considered a substantial interval of time. In *R v Marsh(1935) 25 Cr App .R. 49* two months was referred to as a considerable delay. In both cases the application for extension of time was refused.
- 4.3 In *Nowich and Peterborough BS v Steed [1991] 2 A11 ER 886 at p.886 Lord Donaldson MR* comparing two cases commented as follows:
- "In Palata's case the delay was as short as could be and was wholly excusable. The merits therefore played little part. In Rawashdeh's case the delay was very much longer – it was six weeks in fact - and was not wholly excusable. Much merit was required to overcome it".*
- 4.4 In *Palata Investments vs Burt and Sinfield [1985] 2 AII ER 517* the delay mentioned by Lord Donaldson as above was 3 days. In *Rawashdeh v Lane [1988] 40 EG 109* the delay was 6 weeks.
- 4.5 According to the guidelines set out by the above authorities I find that in this matter the delay of one month to make the present application is a substantial interval of time and therefore the Applicant ought to show more merits to overcome it.

5. The Reasons for the Delay

- 5.1 The Applicant has deposed in his Affidavit that despite the Ruling being delivered on 3rd March, 2014, their Solicitors did not receive the copy of the transcripts until 6th March, 2014. It is further deposed by him that he could not attend his Solicitors office thereafter to provide instructions due to work commitments. He states that he had to do a job for the Company in Suva and was out of town for few days. He also states that he has a pending criminal case at the Nadi Magistrates Court which required him to undergo a psychological evaluation and that he had appointment at Lautoka Hospital on the 3rd Mach, 2014. He states further that the said

appointment with the Doctor was re-scheduled to 10th March, 2014 and on that day he was asked to return on 12th March, 2014.

5.2 From the Affidavit evidence of the Applicant it is clear that he has given priority to his business activities without meeting his Solicitors to give instructions at the proper time. There is no evidence before court to prove that he could not meet the Solicitors due to an illness. What he has stated is that he had to go to the Lautoka Hospital 3 times to undergo a psychological evaluation. This does not prove that he was an inpatient at the hospital during the relevant period.

5.3 Therefore I hold that the excuse or grounds put forward by the Applicant to explain the delay cannot be accepted.

6. Chances of Appeal Succeeding

6.1 Next factor to be considered in this application is whether the grounds of appeal would succeed if time is extended.

6.2 The proposed grounds of appeal are as follows:

- (1) The learned Master erred in law and in fact in finding that the Judgment given on the 29th day of June, 2010 was regular when in fact the Writ of Summons and Acknowledgment of Service and Notice of Assessment had not been properly served on the Appellant/Original Second Defendant.
- (2) The learned Master erred in law and in fact in not setting aside the Default Judgment after the Appellant/Original Second Defendant gave full explanation in his Affidavit sworn on the 1st day of August, 2012 showing a defence on merits and which disclosed an arguable or triable issue.
- (3) The learned Master erred in law and in fact in finding that the Appellants'/Original Second Defendants' admission of meeting the bailiff in Nadi Town was sufficient notice that Default Judgment would be entered against the Appellant/Original Second Respondent in default of defence.

(4) The learned Master erred in law in not exercising his discretion properly and/or adequately and/or in proper context when considering the application of the Appellants/Original Second Defendant and acted on a wrong principle.

(5) The learned Master erred in law and in fact in taking irrelevant matters into account when coming to his decision.

6.3 It is evident from the 1st ground of appeal that the Applicant is challenging the service of the Writ of Summons and Acknowledgment of Service and Notice of Assessment. He states that they have not been properly served on him.

6.4 The learned Master has dealt with the issue whether the default Judgment was obtained regularly in paragraphs 22 to 36 of his Ruling. There are no new facts adduced by the Applicants' Affidavit against the finding of the learned Master. Therefore I see no reason to disagree with the Masters' finding on this issue.

6.5 As to defence on merits the learned Master has dealt with the evidence adduced by the Applicant in paragraph 39 and 40 of the Ruling and come to the finding that there is no defence on the merits that has real prospect of success. At the end of paragraph 40 he states as follows:

".....why the second Defendant did permit the 1st Defendant to use the company vehicle for his private use after allowing day off for him? There is nothing in Mr Michael Fenneh's Affidavit to explain this issue".

6.6 Though the Applicant denies being vicariously liable and state in his Affidavit in Support of the application for setting aside the Default Judgment that the 1st Defendant was not carrying out services and/or work at the request of the Applicant, I am of the view that this is a weak defence which has less probability of success.

6.7 In the 3rd ground of appeal it is stated that the learned Master erred in law and in fact in finding that the Applicants/Original Second Defendant's admission of meeting the bailiff in Nadi town was sufficient notice that the default Judgment would be entered against the Appellant/Original Second Respondent on the default of defence.

6.8 In perusing paragraph 38 of the Ruling of the learned Master I am of the view that he has not come to a finding that the 2nd Defendant meeting the bailiff in Nadi town was sufficient notice of the default Judgment. He has arrived at the said finding on other grounds which appears in the previous paragraphs, paragraph No.s 28 to 36. Therefore I find that this ground of appeal is also not a meritorious ground of appeal.

6.9 In considering all of the above I am satisfied that the learned Master has exercised his discretion properly and/or adequately when considering the application of the Applicant and that the grounds of appeal are based on facts which have been already dealt with by the Master.

In my view the Applicant does not have any reasonable prospect of success if she proceeds with her appeal.

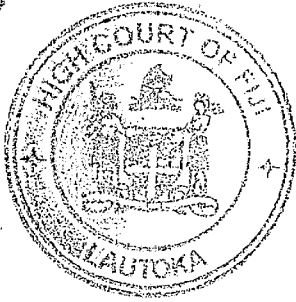
7. Prejudice to the Respondent

The Respondent has lost her one arm due to the accident which occurred on 16th May, 2006. She is a domestic worker who is severely handicapped by the loss of her left arm. It is clear from the history of this matter that the Applicant (Original 2nd Defendant) has purposely delayed the proceedings by filing 3rd party Summons and later agreeing that there was no cause of action against the 3rd party and also by evading to appear and defend the action. Therefore further delay of these proceedings will greatly prejudice the Respondent who is waiting many years for the fruits of her judgment.

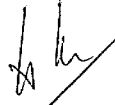
8. Final Orders

- 8.1 (i) For all the reasons set out above the application to file Notice of Appeal out of time is rejected and dismissed.
- (ii) Accordingly application for Stay of the Judgment dated 3rd March, 2014 and the Default Judgment dated 23rd June, 2010 and dated 29th June, 2010 rejected and dismissed.

- (iii) The Applicant shall pay the 1st Respondent costs summarily assessed in a sum of \$2,000.00 within 3 weeks from the date of this Judgment.



At Lautoka
02/12/2014



Lal S. Abeygunaratne
Judge