

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Appeal No. 9 of 2015

BETWEEN : **LAMI TOWN COUNCIL**

APPELLANT

AND : **NATIVE LAND TRUST BOARD**

RESPONDENT

BEFORE : **Hon. Justice Kamal Kumar**

COUNSEL : **Ms S. Nayacalevu for the Appellant**

: **Ms L. Komaitai & Ms E. Raitamata for the Respondent**

DATE OF HEARING : 3 June 2014

DATE OF JUDGMENT : 31 March 2016

JUDGMENT

1.0 Introduction

- 1.1 On 6 November 2014, Appellant filed Notice of Intention to Appeal (“NIA”) Learned Chief Magistrate’s Order granted on 30 October 2014 in Suva Magistrates Court Civil Action No. 51 of 2009 whereby the Learned Chief Magistrate stayed Order granted by him on 6 May 2014 in favour of the Appellant.
- 1.2 On 19 November 2014, Appellant filed grounds of appeal.
- 1.3 This matter was called in this court on 24 March 2015, when parties were directed to file Submissions and Appeal was set down for hearing on 3 June 2015 at 9.30 am.
- 1.4 Appellant filed Submission on 13 May 2015.
- 1.5 On 3 June 2015, Counsel for the Respondent applied for adjournment on the ground that Counsel in carriage of this matter was engaged in trial before another court.
- 1.6 When Court enquired as to when trial date is fixed and why Respondent has failed to file Submissions the Counsel appearing for Respondent stated that he had “no idea”.
- 1.7 The appeal was then stood down until 2.30pm for hearing.
- 1.8 Appeal was heard on 3 June 2014 at 2.30pm and adjourned for Ruling on Notice.

2.0 Background Facts

- 2.1 On 7 May 2009, Appellant filed Writ of Summons and Statement of Claim in Suva Magistrates Court Civil Action No. 95 of 2009.
- 2.2 On 14 May 2009, Defendant filed Notice of Intention to Defend.
- 2.3 Pursuant to Leave of Magistrates Court, Plaintiff on 25 September 2009, filed Amended Statement of Claim.
- 2.4 On 30 November 2009, Defendant filed its Statement of Defense.

- 2.5 After several adjournments Magistrates Court Action was finally heard on 21 June 2013.
- 2.6 Judgment by the Learned Chief Magistrate was delivered on 6 May 2014.
- 2.7 On 21 May 2014, Respondent filed NIA to appeal Learned Chief Magistrate's Judgment delivered on 6 May 2014 together with Grounds of Appeal.
- 2.8 On 26 May 2014, Respondent filed Application for Stay of Execution of Magistrates Court Judgment pending determination of its Appeal.
- 2.9 The Application for Stay was set down for hearing on 25 August 2014, but was adjourned to 15 September 2014 and then to 30 October 2014 at 11.00 a.m., for hearing.
- 2.10 On 30 October 2014, there was no appearance for the Appellant and the Learned Chief Magistrate granted Order in Terms of the Stay Application with costs in the cause.
- 2.11 Appellant appealed against the Stay Order granted on 30 October 2014.

3.0 Appeal

3.1 The Grounds of Appeal are stated as follows:-

- (i) That the Learned Magistrate erred in law and in fact and or misdirected himself in law and in fact in granted Orders in Terms of the Notice of Motion dated 26th May 2014, when clearly the Notice of Intention of Appeal filed by the Defendant on the 21st of May 2014, was outside of the statutory required timeframe for the filing of such Application.
- (ii) That Learned Magistrate's decision is wrong and erroneous and tantamount to a wrongful exercise of discretion having regard to all the facts and circumstances of the case and evidence on the whole.

Grounds 1 and 2

3.2 I note that Notice of Motion dated 26 May 2014, filed by the Respondent in Magistrates Court for stay of execution is made pursuant to Order XXXIV Rule 3 of Magistrates Court Rules Act (Cap 14) and the inherent jurisdiction of the Magistrates Court.

3.2 It is noted with much regret that the legal practitioner who prepared the Notice of Motion either had no regard to the rules of the Court or lacked specific knowledge for following reasons:-

(i) Order XXXIV Rule 3 is derived from Magistrates Court Rules and not Magistrates Court Act (Cap 14);

(ii) Order XXXIV Rule 3 of the Magistrates Court Rules provides as follows:-

“Interlocutory orders may also be enforced according to the following provisions:-

If a plaintiff in a suit makes default or fails in fulfilling any interlocutory order, the court may, if it thinks fit, stay further proceedings in the suit until the order is fulfilled, or may give a judgment of non-suit against such plaintiff, with or without liberty of bringing any other suit on the same grounds of action, or may make such other order on such terms as to the court shall seem fit. If a defendant in any suit makes such default or failure, the court may give judgment by default against such defendant, or make such other order as to the court may seem just:

Provided that any such judgment by default may be set aside by the court, upon such terms as to costs or otherwise as the court may think fit.”

It is quite clear that Order XXXIV Rule 3 deals with Interlocutory Orders or Judgments entered in default.

Respondent's stay application in the lower Court was in respect to Judgment delivered by the Learned Magistrate in the substantive matter not an interlocutory matter.

- (iii) Section 101(2) of the Constitution of the Republic of the Fiji (2013) provides:-

“s101-(2) The Magistrates Court has such jurisdiction as conferred by a written law.”

Hence, the Magistrates Court unlike the High Court does not have inherent jurisdiction.

- (iv) **Order XXXVII Rule 6 of the Magistrates Court Rules provide as follows:-**

“Neither notice of intention to appeal nor an appeal shall operate as a stay of execution or of proceedings under the judgment or decision appealed from, except so far as the court below or the appellate court may order, and no intermediate act or proceeding shall be invalidated except so far as the court below may direct.”

The Respondent should have applied for Stay of execution of the Judgment delivered on 6 May 2014, under Order XXXVII Rule 6 provided the Copy Record has not been transmitted to the Appellant Court (Order XXXVII Rule 9).

- 3.3 Appellant's main ground of appeal is that since the Respondent filed NIA out of prescribed time the Learned Chief Magistrate did not have jurisdiction/discretion to deal with the stay application.

- 3.4 Order XXXVII Rule 1 of the Magistrates Court Rules provide as follows:-

“1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called “the court below”) notice in writing of his intention to appeal:

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.”

- 3.5 Judgment subject to Respondent’s Appeal was delivered on 6 May 2014 which meant that the Respondent had to file NIA by 13 May 2014.
- 3.6 Instead of filing and serving NIA by 13 May 2014, Respondent filed NIA on 21 May 2014, which is eight (8) days later.
- 3.7 In **Katafono v. Brown** (2016) Civil Action No. 135 of 2014 (14 January 2016) this Court held that Magistrates Court or the High Court has jurisdiction/discretion to extend time for filing for NIA pursuant under Order III Rule 9 of Magistrates Court Rules.
- 3.8 I agree with Appellant’s submission that because no NIA was filed within the prescribed time and there was no Application by Respondent to extend time for filing of NIA, the Learned Chief Magistrate exercised his discretion in error when he stayed execution of Judgment delivered on 6 May 2014, pending determination of the Appeal.
- 3.9 The Learned Chief Magistrate could have only dealt with the Stay Application under Order XXXVII Rule 6 as stated in the preceding paragraph if NIA was filed within prescribed or the Respondent had filed Application to extend time to file and serve NIA beyond prescribed time.
- 3.10 Therefore, I have no alternative but to allow Appellant’s appeal.

4.0 Respondent’s Appeal

- 4.1 In view of the substantial delay in finalization of the Magistrates Court matter I think it is appropriate for this Court to hear Respondent’s appeal.
- 4.2 The reason I say this is that:-
- (i) Magistrates Court Action commenced on 7 May 2009;
 - (ii) The Magistrates Court Action was heard by Magistrate who left the bench without delivering judgment;

- (iii) The hearing then commenced on 29 February 2012, with evidence being heard on 21 June 2013, and hearing completing on 10 July 2012;
- (iv) Judgment in respect to the substantive matter was delivered on 6 May 2014.

4.3 This Court in **Katafona v. Brown** after being referred to section 38 and 39 of the Magistrates Court Act (Cap 14) stated as follows:-

“2.18 Section 38 of Magistrates Court Act provide as follows:-

“38. Subject to the provision of Section 39, the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates’ court or by the High Court, as prescribed by rules of the Court” (emphasis added)

2.19 Under section 38 appeal will be entertained by High Court if appellant gives notice of intention to appeal, files grounds of appeal within the prescribed time and give security for costs if ordered by Magistrates Court.

2.20 Section 39 of the Magistrates Court Act provides as follows:-

“39. Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a magistrates’ court, on any terms which it thinks just.” (emphasis added)

2.21 Section 39 has been used to extend time for filing of Notice of Intention to Appeal and Grounds of Appeal.

*2.22 My view on section 39 is that it does not give power to Magistrates Court or High Court to extend time for filing of notice of intention to appeal or grounds of appeal **but** gives the High Court discretion to **“entertain any appeal from Magistrates Court, on any terms which it thinks just”** when the Appellant has failed to comply with rules of Court in relation to civil appeal.*

2.23 For instance where the appellant files notice and grounds of appeal without giving notice of intention to appeal within the prescribed time the High Court may hear the appeal “on terms it thinks just”.

- 4.4 Before I proceed further I must put a caveat in respect to exercise of Courts discretion under Section 39 of Magistrates Court Act and that caveat is that the Court must be very cautious in exercise of Court’s discretion under this section and should only exercise the discretion in exceptional cases. In particular, where the issue to be dealt with has some public interest that needs to be determined by the High Court.
- 4.5 In this instant, the issue that was decided by the Magistrates Court was whether the Respondent (iTaukei Land Trust Board) is liable to pay town/city rates in respect to unalienated land.
- 4.6 I have carefully read and analyzed the pleadings filed in the Magistrates Court and the Judgment delivered on 6 May 2014, and am of the view that the issue that was decided by the Magistrates Court needs to be determined by this Court for certainty and for the reason that majority of land forming part of almost all municipalities in Fiji are subject to Natives Leases.
- 4.7 Also, the Magistrates Court Action commenced in 2009 and should have been finalized within one to two years (including appeal). It is in the public interest that this case be finalized as quickly as possible.
- 4.8 I will therefore exercise my discretion under Section 39 of the Magistrates Court Act (Cap 14) to hear Respondent’s appeal even though it has not complied with Order XXXVII Rule 1 of the Magistrates Court Rules.

5.0 Order

I make following Orders:-

- (i) Appeal is allowed;
- (ii) Respondent, iTaukei Land Trust Board pay Appellant, Lami Town Council costs assessed in the sum of \$1,000.00 within fourteen (14) days of this Ruling;
- (iii) Respondent's appeal is adjourned to 15 April 2016 at 9.30 am to fix hearing date.



At Suva
31 March 2016

Shekinah Law for the Appellant
Legal Department - iTaukei Land Trust Board