

IN THE HIGH COURT OF FIJI AT SUVA
MISCELLANEOUS JURISDICTION

CIVIL ACTION HBM No. 52 of 2016

BETWEEN

SULIASI KUDRUVI T/A TURTLE ISLAND & LENDING SERVICES of
Ratu Mara Road, Suva, Businessman.

APPLICANT

AND

JOSEPH CIVONICEVA of No. 10, Alexander Street, Suva,
Businessman.

RESPONDENT

Counsel : Mr. G. O'Driscoll for Appellant.
Ms. R. Lal for Respondent

Written submissions : 02nd August, 2016, 09th August, 2016 and
16th August, 2016

Date of Ruling : 23rd August, 2016.

RULING

(On the application for Leave to Appeal Out of Time)

[1] This is an application for leave to appeal out of time and certain other orders under and in terms of order III rule 9 of the Magistrate Court Rules from the judgment of the Magistrate's Court dated 19th March, 2014.

In the Originating Summons (Expedited Form) the applicant seeks the following orders;

1. An order pursuant to Order III rule 9 of the Magistrates' Court Rules that leave be granted for the applicant to appeal against the ruling of the Magistrate's Court delivered on 19th March, 2014.
2. An order pursuant to Order III rule 9 of the Magistrates' Court Rules for extension of time for the applicant to file intention to appeal and grounds of appeal against the ruling of the Magistrate's Court delivered on 19th March, 2014.
3. An order for stay of execution of the ruling of the Magistrate's Court delivered on 19th March, 2014 pending the hearing of the application herein and appeal to the High Court.

[2] I will first deal with the issue whether the court has the power to grant extension of time to file notice of intention to appeal.

[3] Order III rule 9 of the Magistrates' Court Rules provides:

A judge shall have the power to enlarge or abridge the time appointed by these Rules or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same was not made until after the expiration the time appointed or allowed.

[4] Order XXXVII Rule 1 of the Magistrates' Court Rules provides as follows;

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 the judgment is pronounced.

[5] In *Crest Chicken Ltd v Central Enterprise Ltd* [2005] FJHC 87; HBA 0013j.2003s it was held that in Order XXXVII Rule 1 there is no provision for extension of time to give notice of intention to appeal, although there is power to extend time to file grounds of appeal.

[6] In *Resina Nafroe Katafono v Kenneth Richard Brown* [2016] FJHC 19; HBC135.2014 (14 January 2016) it was held:

Section 39 of the Magistrates Court Act does not give this Court discretion to extend time for filing of notice of intention to appeal or grounds of appeal but gives this Court power to deal with the appeal before the Court on terms it thinks just even though appellant has not complied with rules in respect to Civil Appeal (ss 38 and 39 of Magistrates Court Act);

This Court and Magistrates Court has jurisdiction/discretion to extend time for filing of notice of intention to appeal and grounds of appeal under Order 3 Rule 9 of the Magistrates Court Rules, even if Application to enlarge time is made after prescribed time has expired.

[7] Sections 38 and 39 of the Magistrate’s Court Act (Cap 14) are as follows;

38. Subject to the provisions of section 39, the Supreme Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates’ court or by the Supreme Court, as prescribed by Rules of Court.

39. Notwithstanding anything hereinbefore contained, the Supreme Court may entertain any appeal from the magistrates’ court, on any terms which it thinks just.

[8] Section 39 of the Magistrates’ Court Act (Cap 14) confers upon the court, power to entertain and proceed with an appeal from the Magistrate’s Court despite any delay in lodging it. However, the legislature in its own wisdom has not provided for granting extension of time to

give notice of intention to appeal. If the legislature intended to confer the power to extend the time to file notice of intention to appeal it would have specifically included such provisions in the Magistrates' Court Act.

[9] It is pertinent to see what the legislature intended in enacting these provisions. The purpose in my view, of giving, either in writing or verbally, the notice of intention to appeal, is to inform the opposite party that an appeal will be lodged against the judgment or order entered in his favour and it is not just a formality.

[10] The question of giving notice of intention to appeal does not arise now because with the filing of this application the respondent became aware of the intention of the applicant. If the party who is dissatisfied with an order or a ruling of the court intends to challenge it, he must inform the court and the successful party of his intention to appeal before the successful party takes steps to execute the judgment. This is the only reason which can be attributed to allocating such a short period of time by the statute to give notice of intention to appeal.

[11] When the question arises as to whether the court has the power to grant extension of time to give notice of intention to appeal the provisions of Order XXXVII of the Magistrates' Court Rules must be read in conjunction with the provisions of section 39 of the Magistrates' Court Act (Cap 14). When the provisions of Order XXXVII rule 1 read with section 39 of the Magistrates' Court Act it is abundantly clear that the court has no power to extend the period of time to file notice of intention to appeal. For these reasons the court is of the view that a party dissatisfied with an order of the court is not entitled to seek extension of time to file notice of intention to appeal.

[12] The judgment was pronounced by the learned Magistrate on 19th March, 2014 and the FIFA was issued 28th April, 2014. The applicant filed notice of intention to appeal on 28th March, 2014. On 08th May, 2014 the applicant made an application to the Magistrate's Court for stay of execution of the judgment pending appeal which was refused by the learned Magistrate on 23rd July, 2014. Against this ruling the applicant sought leave to appeal out of time from the High Court which was also refused. Then the present application was made seeking leave to appeal out of time against the ruling of the learned Magistrate dated 19th March, 2014.

[13] The learned counsel for the respondent objected to this application on the ground that since this matter has already been dealt with by the court the ruling given in the earlier

application operates as *res judicata* to the present application. In this regard the learned counsel relied on the following decisions:

Arnold v National Westminster Bank Plc [1991] 3 All E R 41

Cause of action estoppels arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened.

Razak v Fiji Sugar Corporation Ltd [2005] FJHC 720; HBC 208.1998L (23 February 2005)

To raise the doctrine of *res judicata* the defendant must be able to show that the same parties have been before a court of competent jurisdiction and had a decision on the same issues, or at least had had an opportunity of raising related issues.

For the operation of the doctrine of *res judicata* there must be also an identity of subject matter between the proceedings. The identity may arise from a cause of action or from issue estoppel: **Green v Hampshire CC** [1979] 1 CR 861 at p.864.

[14] In the application filed on 06th February, 2016 the applicant sought leave to appeal out of time against the ruling of the Magistrate's Court delivered on 23rd July, 2015 and the stay of execution of the judgment pending the hearing of the said application. The present application is for leave to appeal out of time against the judgment delivered by the learned Magistrate on 19th March 2014 and for the stay of execution until the hearing of the said application. These two applications are against two different decisions although made in the same case and therefore, the earlier decision does not operate as *res judicata* to the present application.

[15] The next question for determination is whether the applicant has provided the court with sufficient grounds to grant the application for leave to appeal out of time.

[16] In the case of **Toma Beuka v The State** [2002] FJHC 110; HAA 0013D.2002S it was held that in considering an application for leave to appeal out of time, a Court generally considers the length of delay, the reasons for the delay, whether the appeal has any prospects of success and whether an injustice will arise if leave is refused.

[17] In **Delana v The State** [2005] FJHC 173; HAM 0034].2005S it was held that the appeal period can be enlarged for good cause. This may include the appellant's difficulties in obtaining the Court record, lack of legal representations and constraints suffered in custody. The appeal period may also be enlarged where there are obvious merits in the appeal.

[18] When this matter came up for hearing before me both counsel informed court that the ruling can be made on written submissions and the court granted them time to file their submissions. In the affidavit filed by the applicant in support of the originating summons he sought to challenge the propriety of the findings of Mutunayagam J in his judgment dated 09th March 2016 on the application for leave to appeal out of time against the ruling of the learned Magistrate on 23rd July, 2014. This court has no power or authority to discuss the legality of the said judgment. If the applicant was dissatisfied with the findings of the court he could have challenged them in a higher forum and not in this application.

[19] The applicant has failed to adduce any ground for his delay in making this application. If he was not satisfied with the judgment of the learned Magistrate he could have appealed against it and if he was out of time the applicant could have made an application for leave to appeal out of time immediately thereafter.

[20] In explaining the delay in coming to court the applicant in his affidavit file in support of the originating summons he avers as follows:

14. That the reason for this present application being filed so long after the ruling of the Magistrate's Court on the 19th March 2014 is that MRV Legal Consultants in acting as my solicitors at the time submitted the notice of intention to appeal in time but it was stamped as filed 2 days late without an application for leave to appeal out of time. This lead to the eventual outcome in the Judgment of Mr. Justice Mutunayagam saying that there was no appeal on foot. That judgment was only delivered on 9th March 2016.

15. That since 9th March 2016 I have been looking for a new lawyer to take up my case and I engaged the firm of O'Driscoll & Co. for that purpose after collecting all my documents from my previous solicitors and from the Magistrate's Court. I made this appointment formal on 13th April 2016 and have immediately filed this action.

[21] As I have already stated the present application for leave to appeal out of time is not against the judgment delivered on 9th March, 2016 against the ruling delivered by learned Magistrate on 19th March, 2014. This long delay of more than two years has not been explained by the applicant.

[22] The affidavit of the applicant or the submission of the learned counsel does not disclose any ground of appeal. Therefore, the court is not in a position to consider whether the applicant has any prospects of success in the appeal. On a careful consideration of the materials available on record it appears that the applicant has been making various applications to delay the execution of the judgment of the Magistrate's Court. If the applicant is allowed to prolong this matter the respondent will be placed at a disadvantages position in not being able to reap the fruits of the judgment entered in his favour nearly 2 ½ years ago.

[23] For the reasons aforementioned I make the following orders.

ORDERS.

1. The originating summons filed on 18th April, 2016 is struck out.
2. The applicant is ordered to pay the respondent \$1000 as costs of this application.


Lyone Seneviratne,
JUDGE.



23rd August, 2016.