

**IN THE HIGH COURT OF FIJI**  
**WESTERN DIVISION AT LAUTOKA**

**[CIVIL JURISDICTION]**

**Civil Action No. HBA 2 of 2015**

**IN THE MATTER** of an Appeal from the Judgment dated 4<sup>th</sup> March 2015 delivered at Nadi Magistrate's Court in Civil Case No. 0247 of 2011.

**BETWEEN:** **FILIFE NANOCA** c/- Sunflower Aviation Limited, CAAF Compound, Namaka, Nadi, Engineer.

**APPELLANT**

**A N D:** **FIJI AIRLINES LIMITED T/A PACIFIC SUN** a duly registered Company under the laws of Fiji having its registered office at Air Pacific Limited Maintenance & Administration Centre, Nasoso Road, Nadi.

**RESPONDENT**

Before : Hon. Mr. Justice R.S.S. Sapuvida

Counsel : Mr. E. Maopa for the Appellant  
Ms. M. Muir for the Respondent

Date of Ruling: 03 March 2017

**JUDGMENT**

**Background Facts**

- [1]. The Appellant/ Defendant (hereinafter referred to as the Appellant) was an employee of the Respondent/ Plaintiff (hereinafter referred to as the Respondent). During the period of employment the Appellant signed a bond with the Respondent in the sum of \$10,000.00 to continue employment for a term of 3 years. Before the cessation of the period of the bond the Appellant from his end terminated the employment with the Respondent. The Respondent then instituted an action against the Appellant in the Nadi Magistrate's Court [Civil Case No. 0247 of 2011] claiming the repayment of the bond money where the Nadi

Magistrate's Court entered the judgment on 4 March 2015 in favor of the Respondent which is the subject matter of the present appeal before this Court.

- [2]. The Appellant instituted these proceedings in this Court by way of filing "Notice of Grounds of Appeal" dated 4 May 2015 and filed on 8 May 2015.
- [3]. The three key issues before this Court to be dealt with by this ruling are:
- (I) The Notice of Grounds of Appeal filed in this Court by the Appellant against the judgment delivered by the Nadi Magistrate's Court on 4 March 2015.
  - (II). The Summons filed by the Respondent dated 14 September, 2015 to set aside for irregularity and to strike out the Appellant's Notice of Grounds of Appeal.
  - (III). The Application of the Appellant filed by way of Summons dated 12 November 2015 to strike out the Summons filed by the Respondent referred to in paragraph [2] (II) above.
- [4]. According to the nature of these applications pending in this Court, it is my thoughtful opinion that the Respondent's application filed on 14 September 2015 shall have the superseding effect over the other two. The reason is very obvious since it is the main issue out of the three and it will directly influence on the issue no. [2] (I), and will decide on which way the other two applications would be heading for, once the former is decided by the Court. Therefore, I will firstly deal with the application pursued by the Respondent filed by way of Summons to strike out the Appellant's Grounds of appeal, viz. the issue no. [2] (II) above.

#### **Application by the Respondent**

- [5]. The application by the Respondent to set aside and strike out the Appellant's Notice of Grounds of appeal is made under Order 2 Rule 2 of the High Court Rules 1988 on the basis:
- (i) That the said Notice of Grounds of Appeal, being an appeal from a judgment of the Nadi Magistrates Court, has been wrongly and irregularly filed with the High Court of Fiji acting as the Appellate Court, as Order XXXVII Rule 3 (1) of the Magistrate's Court Rules requires the Notice of Grounds of Appeal to be filed with the lower court, being the Nadi Magistrates Court;
  - (ii) That the Notice of Grounds of Appeal has been filed out of time, as the same is required to be filed within one month after judgment was given on 4

March 2015 by the said Order XXXVII Rule 3 (1), but was filed on 8 May 2015, some 66 days after judgment;

- (iii) That the Appellant has omitted and neglected to file application for extension of time and or for leave to appeal out of time prior to filing his Notice of Grounds of Appeal, as required by Order XXXVII Rule 4 of the Magistrates Court Rules; and
- (iv) That in the circumstances the filing of the said Notice of Grounds of Appeal with the High Court of Fiji more than a month out of time constitutes an abuse of process.

[6]. Application to set aside for irregularity (O.2, r.2)

2.- (1) *An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*

(2) *An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.*

**Is the Appellant's Notice of Grounds of Appeal irregular and out of time?**

[7]. The Appellant's Notice of Grounds of Appeal was dated on 4 May 2015 and filed with the Lautoka High Court on 8 May 2015. It states on its face that it is an appeal from a Judgment dated 4th March 2015 of the Nadi Magistrate's Court.

[8]. Hence, it appears on the face of that document that it was filed out of time and that it was filed with the Lautoka High Court instead of the Nadi Magistrate's Court.

[9]. The Respondent submits that this is a sufficient ground to strike out the Notice/Grounds of Appeal.

[10]. Order XXXVII Rule 3(1) and (2) of the Magistrate's Court Rules provide as follows:

3.- (1) *The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.*

*(2) At the time the appellant files the grounds of his appeal he shall deposit with the clerk of the court below such sum as the clerk shall consider sufficient to cover the fees prescribed in Appendix B for the preparation, certification and copying of the record.*

[11]. The Rules of Court are clear to this effect and any delay should have been supported with reasonable reason and put forward in an application for extension of time to appeal or leave to appeal out of time, as required by Order XXXVII Rule 4 of the Magistrates Court Rules as follows:

*Effect of failure to file grounds of appeal*

*4. On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.*

[12]. Here, the Appellate Court or the Court below shall only see the fitness of an extension only upon an application to that effect is brought before the Court by the Appellant. When there is no such application made by the Appellant, then the Court by its own motion cannot extend the time and grant leave to file the Notice of Appeal or the Grounds of Appeal out of time whichever the case may be.

[13]. The Respondent submits that the Appellant's Notice of Grounds of Appeal is irregular, not in conformity with the Rules, and it is ought to be considered as abandoned and should be struck out.

[14]. Respondent further refers to the Appellant's Notice of Grounds of Appeal, first paragraph, lines 7 and 8, which read as follows:

*"... and of for an order that leave be granted to extend time for appeal if such time or appeal lapses . . . ."*

[Italic added]

[15]. The only inference this Court can apply and reasonable for the Court to draw from the inclusion of the above language in the Notice of Grounds of Appeal is that the Appellant and his Solicitors were fully aware that the time limit for filing the appeal had expired prior to the filing of the Notice of Grounds of Appeal on 8 May 2015, and that the Appellant cherry-picked to proceed with filing the appeal out of time (and in the wrong forum) without first applying for leave to extend time.

[16]. The Respondent submits that the above actions of the Appellant constitute an abuse of the process of this Court, and that the Notice of Grounds of Appeal

should accordingly be struck out with costs to the Respondent on an indemnity basis.

### The Case Law as to Obeying the Rules

[17]. In the case of One Hundred Sands v Te Arawa Limited, Suva High Court Civil Action No HBC 112 of 2014 (30 June 2015); [2015] FJHC 487, the Court dismissed the Appellant's Summons for leave to appeal from an interlocutory order of the Master of the High Court, on the grounds that the summons was not filed and served with the time required by the High Court Rules, aptly stating as follows:

*"18. I am of opinion that litigants and their legal representatives must not think that they can invoke the inherent jurisdiction of the court like a magic wand to waive away the consequences of their omission to comply with the Rules.*

*19. If the Privy Council considered the lame excuse of the lay appellant in Ratnam vs. Cumarasamy did not constitute material on which to exercise their discretion in favour of the appellant, how much more must I find here that the Defendant's solicitors have failed to even provide any explanation to constitute material on which I can exercise my discretion in favour of the Defendant.*

*20. No reason whatsoever was provided for the delay in waiting until the eleventh hour on the last day for filing the summons thus effectively and unilaterally precluding any possibility for the summons to be issued and then served on the Plaintiff in time."*

[Italic added]

[18]. In the said decision, the Court relied on the principle stated in Ratnam vs Cumarasamy & Another 1964 3 All ER 933 at 935 [supra] which has been adopted and applied in Fiji in a long sequence of cases.

[19]. As cited by One Hundred Sands [supra] the Privy Council in Ratnam vs Cumarasamy & Another [supra] states that:

*"The rules of Court must, prima facie be obeyed, and in order to justify a Court in extending time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the laws were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."*

- [20]. The resemblances are well fitted with the present case. In the instance, the Appellant's failures include failing to file on time; in fact he was more than two months out of time when he filed his Notice of Grounds of Appeal.
- [21]. Moreover, although it is reasonable to infer that the Appellant was aware of the necessity to file his Notice of Appeal with the Nadi Magistrate's Court as he had filed his Notice of Intention to Appeal there, the Appellant filed his Notice of Grounds of Appeal out of time with the Lautoka High Court instead, and yet with no explanation as to the delay.
- [22]. Despite the Order XXXVII rule 4 of the Magistrate's Court Rules as stated earlier in paragraphs 11 & 12 above, which clearly require an application for extension of time from either the Magistrates Court or the High Court if an appellant neglects to file his grounds of appeal on time, the Appellant in this instance did not apply to either Court for such extension of time but has simply proceeded with filing his Notice of Grounds of Appeal out of time, clearly ignoring the rules.

#### **Principles Applying to Extension of Time to Appeal**

- [23]. The legal principles that apply to an application for leave to appeal out of time, and extension of time to appeal is well established, and apply equally to appeals from Magistrates Court as they do to appeals from the High Court.
- [24]. The Fiji Court of Appeal in **Colonial Insurance Agents Association v Bank South Pacific (Fiji) Ltd** [2013] FJCA 133; **Miscellaneous Action 36 of 2011 (5 December 2013)** relating to an application for leave to appeal out of time, and at clause [10] of the Decision, the Court adopts the factors to be considered as set out in the earlier decision of **Bahadur Ali and Ors -v- Ilaitia Boila and Chirk Yam & Ors, Civil Appeal No ABU 0030 of 2002**, as follows:
- (i) The length of delay
  - (ii) Reasons for delay
  - (iii) The chances of the appeal succeeding if time is extended
  - (iv) Prejudice to the respondent
- [25]. In that case delay of 6 days was attempted to be excused as being due to a mix up in the solicitor's office. This was not accepted as a satisfactory excuse, the Court of Appeal assessed the chances of successful appeal as remote, and the application for extension of time to appeal was refused.
- [26]. In the case of **Damodar Naidu v Ranjeet Singh and Another**, **Lautoka High Court Civil Appeal No 4 of 2015**, in which the High Court dealt with an application for extension of time to appeal from a judgment of the Magistrates Court, where the

appellant had previously been granted the extension of time by the Magistrates Court but failed to comply with the conditions imposed by that Court. The Court concluded that Order XXXVII Rule 4 of the Magistrates Court Rules only allows for a single application for extension of time, the Court expressed that the opportunity to rely on the inherent jurisdiction of the High Court was very narrow, there was no reason given as to why the appellant was unable to file his appeal within the time allotted by the Magistrates Court, and the High Court dismissed the application.

- [27]. In the case in hand, the Appellant had been given the opportunity by this Court to file his Affidavit in Reply explaining why he failed to file his appeal over two months and later filed in the wrong forum, but the Appellant has neither provided any explanation at all for his delay, nor he remedied his omission and filed a proper application for extension of time to appeal.
- [28]. On the forgoing seasons alone the Court should exercise the discretion to hold the scale in favor of the Respondent disregarding the appellant's belated Notice of Grounds of Appeal filed with no explanation as to the delay.
- [29]. The Respondent submits that, in these circumstances, the filing of Notice of Grounds of Appeal out of time without first applying for leave and extension of time constitutes an abuse of process of this Court, and that the Grounds of Appeal should be struck out as out of time and irregular.
- [30]. The demerits to be considered as to why the Appellant should not be granted extension of time to appeal, as the Respondent points out are as follows:
- (a) Length of delay – two months from the date of the judgment and even 34 days after the sealed order was served on the Appellant's solicitors on 22 April 2015;
  - (b) Reasons for the delay (two months from the judgment) - not given by the Appellant;
  - (c) Chances of the Appeal succeeding – the Appellant's chances are on the low side for the reason that the Appellant is appealing the Learned Magistrate's analysis of the evidence, acceptance of testimony, evaluation of witness and finding of fact, and these are factual findings an appeal court should be reluctant to disturb; and
  - (d) Prejudice to Respondent – Respondent has not been paid its judgment debt to the date of filing the present application and should not be kept out of the fruits of its judgment.

### The Issue of Delay

[31]. Relying on Order XXXVII rule 4, the Respondent submits that since the Appellant failed to file the Grounds of Appeal within the prescribed time, his Appeal is deemed to have abandoned under the Rules and cannot proceed in the absence of an order of either the Magistrates Court or this Court granting leave to file Grounds of Appeal out of time.

[32]. In the case of **Aaryan Enterprise v Mehak Unique Fashion [2011] FJHC 727; Civil Appeal 17.2011 (10 November 2011)** Calanchini J (as he then was) explained the effect and interpretation of Order XXXVII rule 4 (at p5 7) as follows:

*“Looking at the factors in this case, first the length of delay was 19 days and was described by the learned Magistrate as extensive. I would also describe the delay in the same way. There was no explanation for the delay ... I am certainly of the view that the longer the delay, the greater is the requirement to provide not only an explanation but a reasonable explanation”.*

[Italic added]

[33]. In **Aaryan Enterprise (supra)** made a reference to the case of **Tevita Fa -v- Tradewinds Marine Ltd and Another** (unreported Civil Appeal No. 40 of 1994 delivered on 18 November 1994) where Thompson JA sitting as a single judge said at page 3:

*“The application for leave to appeal was filed only 4 days after the end of the period of six weeks. That is a very short time but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted.”*

(Italic added)

[34]. Therefore, if the rules are applied strictly in respect of appeals only a few days out of time, then surely it would be unreasonable to allow an appeal which was filed more than two months late with no attempt to obtain leave to extend time.

### Whether this is Abuse of Process

[35]. The laws, rules and procedures are put in place to ensure that justice is not administered at one's own leisure and that the course of justice is not prolonged. It is indeed a matter to be considered whether this blatant disregard of the rules of the court if entertained, will necessarily reflect on the respect accorded to the



judicial system. When the regular process of law is tested in any manner to be detoured, it is as I see abuse of process.

[36]. One might form an opinion that Courts are institutions of justice and not academies of law. But, another may form an opinion and argue that justice is not delivered unless the institutions of justice delivers justice according to the laws of the land and having given the fullest regard to the rules of natural justice, but not blindly and beyond its limitations. The institutions of justice must always administer justice within the frame of law. The inherent power of the court cannot be exercised when there is clear written law that applies to the given case. The courts become institutions of justice only when they apply the law evenly and with due diligence to administer justice.

[37]. The very recent decision of **Sen v Sigatoka Club** [2015] FJHC 104; **Civil Action 154 of 2014 (23 February 2015)** made reference to **Halsbury's Laws of England Vol 37 page 322** where the term "abuse of process" is described as follows:

*"An abuse of process of the court arises where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes, or, more simply, where the process is misused. In such a case, even if the pleading or endorsement does not offend any of the other specified grounds for striking out, the facts may show it constitutes an abuse of the process of the court, and on this ground the court may be justified in striking out the whole pleading or endorsement or any offending part of it. Even where a party strictly complies with the literal terms of the rules of court, yet if he acts with an ulterior motive to the prejudice of the opposite party, he may be guilty of an abuse of process, and where subsequent events render what was originally a maintainable action one which becomes inevitably doomed to failure, the action may be dismissed as an abuse of the process of the court."*

### **The Appellant's Stand**

[38]. The Appellant filed a counter Summons to strike out the application filed by the Respondent on the basis that Order 2 Rule 2 cannot be used to set aside for irregularity and strike out the Appellant's Notice of Grounds of Appeal.

[39]. Before dealing with the Appellant's counter Summons to strike out the Respondent's Summons, the Court wishes to go back to the initial directions given for the parties to comply with at the very outset of the present main application viz. the Notice of Grounds of Appeal of the Appellant.

[40]. The submissions made by respective Counsel for both the parties and the directions given by this Court on 16<sup>th</sup> September 2015 are:

Counsel's Submissions:

- The Appellant's Counsel seeks 21 days to file the reply to the Affidavit of the Respondent.
- The Respondent's Counsel pleads 14 days from the filing of the Reply to file its response thereafter

Orders of Court:

- The appellant shall file the reply within 21 days from today.
- Unless the appellant files the reply within 21 days from now, the Appellant's application to file the reply shall be rejected.

[41]. The Appellant did not file any type of reply by or before 14 October 2015, when the 21 days stipulated by the said directions of the Court expired. This means that the Appellant has not filed any reply to the Affidavit of the Respondent regarding the substantive matter. Instead, the Appellant filed a counter Summons to strike out the Respondent's summons on 12 November 2015, which cannot be considered as the reply of the Appellant.

Conclusion

[42]. The Summons to strike out so filed by the Appellant does not constitute a response, it does not go to the substantive issue at all, and in like manner the Appellant's Notice of Grounds of Appeal, no reply was filed by the Appellant within the time frame assigned by the Court as well. Therefore, the Appellant has no foothold to file Summons and ask the Court to strike out the Summons filed by the Respondent.

[43]. The Appellant having neglected to file the reply cannot later cover up its own mistakes by filing counter Summons to strike out Respondent's Summons. Instead the Appellant could have at least utilized the said leave given by the Court to submit the reasons for the delay of filing his Grounds of appeal and yet, he had not done so.

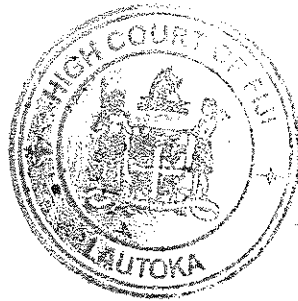
[44]. Therefore, I find that on the Appellant failing to file the grounds of appeal within prescribed time and in the absence of an application to extend the time, it shall be deemed to have abandoned the appeal as clearly stipulated in Order XXXVII Rule 4 of the Magistrate's Court rules.

[45]. For all the above reasons I conclude that the Notice of Grounds of Appeal filed by the Appellant should be dismissed.

[46]. Hence, the Court need not endeavor to discuss the other issues stated in paragraph [3] of this ruling.

**Orders of the Court**

1. The Notice of Grounds of Appeal filed by the Appellant is struck out and dismissed with costs in the sum of \$ 500.00 which the Appellant shall pay within 14 days from this Ruling to the Respondent.
2. The Judgment of the Court below and the Orders of this Court shall be enforced by the Court below.
3. The main Case Record of the Nadi Magistrate's Court shall forthwith be transmitted to that Court with a certificate under seal of this Court and the hand of the Deputy Registrar or any other authorized Officer of this Court.



**R.S.S.Sapuvida  
[Judge]**

**At Lautoka.  
03 March, 2017**