

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

HBC NO. 105 OF 2011

BETWEEN : **AZAM ALI** trading as **R. AZZAM INVESTMENTS** of Moto, Ba,
Postal Address, P. O. Box 2987, Ba, Businessman.

PLAINTIFF

AND : **MERCHANT FINANCE & INVESTMENT COMPANY**
LIMITED a limited liability company having its registered
address at Level 1, 91 Gordon Street, Suva.

DEFENDANT

Before : A.M. Mohamed Mackie- J
Appearance : Mr. Chandra o/i of M/s. Bancod-Chandra Lawyers for the Plaintiff
Mr. Kumar o/i of M/s Krishna & Co. for the Defendant
Hearing : Disposed by written Submissions
Date of Ruling : 10th December 2018

RULING

[On Leave to Appeal, Enlargement of Time & Stay]

A. INTRODUCTION

1. This ruling pertains to the Summons (the application) dated and filed on 14th May 2018 by the Plaintiff – Applicant (the plaintiff) moving for the following orders by this court;

1. That leave be granted to the Applicant -Plaintiff to file Notice of Appeal out of time against the judgment of the Acting Master of the High Court delivered on 2nd day of March 2018.
 2. That the whole action be stayed pending determination of this matter.
 3. That the costs of this application be cost in the cause.
 4. Any further relief or orders that this court deems just and appropriate.
2. This application is made pursuant to O.59, r.8 (2).r 9 (b).r10 (1).r 11 & r16 of the High Court Rules 1988 (HCR) and inherent jurisdiction of this court.
 3. The application is supported by the Affidavit of the plaintiff, namely, Azam Ali, and the same is vehemently opposed by the Defendant-Respondent (the defendant).
 4. When the matter came for hearing before me on 26/10/18, learned counsel for both the parties, having suggested for the hearing to be disposed by way of written submissions, have filed respective written submissions accordingly.

B. Background

5. The plaintiff commenced the substantial action against the defendant by way of writ of summons issued by the registry on 11th July 2011 seeking general and special damages together with interest and cost.
6. After the completion of the filing of pleadings and respective affidavits verifying list of documents (AVLD), the pre-trial conference minutes was filed on 24th May 2013.
7. Thereafter, since there was no appearance of or for and on behalf of the plaintiff before the then Master consecutively for three mention dates , namely on 29th August 2013, 14th October 2013 and 22nd November 2013, the matter was taken out of the cause list by the Master on 22nd November 2013.

8. Since, no step had been taken by the plaintiff for the prosecution of the action for nearly two years and 10 months from 22nd November 2013; the defendant on 20th May 2016 filed the Summons for striking out under Order 25 rule 9 of the HCR. However, this summons was dismissed on 27th September 2016 by the then Master on certain technical issue.
9. Thereafter, the 2nd Summons for striking out under the same order and rule was filed by the defendant on 7th November 2016.
10. It was on the aforesaid 2nd Summons of the defendant, the impugned ruling for striking out was made by the Acting Master on 2nd March 2018, against which the plaintiff has preferred this application in hand.
11. The issues for the time being before this court are ;
 - a. Whether leave should be granted to the plaintiff to file the leave to appeal out of time?
 - b. Whether there should be enlargement of time for filing of appeal?
 - c. Whether there should be a stay pending Appeal?

C. The Law:

12. Rules 8 to 11 of Order 59 would be relevant to this application.

12.1. Appeal from Master's decision (O.59, r.8)

An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.'

12.2. Time for appealing (O.59, r.9)

An appeal from an order or judgment of the Master shall be filed and Served within the following period-

- (a) 21 days from the date of delivery of an order or judgment;

- (b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

12.3. Extension of time (O.59, r.10)

'10.-(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter- parte summons supported by an affidavit.'

12.4. Application for leave to appeal (O.59, r.11)

'11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.'

D. Governing Principles

13. The tests that is applied in deciding the application for extension of time include:
- (i) Length of delay;
 - (ii) Reason for the delay;
 - (iii) Chance of appeal succeeding if time for appeal is extended; and
 - (iv) Degree of Prejudice to the Respondent if the application is granted.
14. The plaintiff is seeking leave to appeal the Master's decision made on 2nd March 2018 which is an interlocutory order and the parties are not at variance on this. An interlocutory order delivered by the Master may be appealed with the leave of the Court. Any application for leave to appeal an interlocutory order or judgment must be filed and served within 14 days of the delivery of such order or judgment (See O.59, r.11).

15. The plaintiff made his application to this court on 14th May 2018, exactly after 58 days from the date of expiry of 14 days from the date of the Master's impugned ruling on 2nd March 2018. The last date on which the plaintiff should have filed his leave to appeal application was 16th of March 2018.

The length and Reason for the Delay

16. The length of delay is approximately 58 days. The delay is too long and inexcusable. The reasons adduced for the delay are not satisfactory and acceptable. The plaintiff's past history on how diligently he prosecuted the action against the defendant is also noteworthy. There was inaction on his part for nearly 3 years.
17. Soon after the dismissal of the defendant's first striking out application on 27th September 2016 by the former Master, the plaintiff, if interested, could have moved the court to prosecute his action before the defendant filed its 2nd striking out application on 7th November 2016 as aforesaid. In between the plaintiff had about one month and 10 days to move the court to prosecute the action. But no steps were taken by the plaintiff.
18. Initially, after completion of pleadings and few other formalities before the Master, no further steps were taken by him or his Solicitor to have the action set for trial, though the then Master had given 3 consecutive dates for that purpose.
19. Subsequently, the case being taken out of the role on 22nd November 2013, the inaction on the part of the plaintiff and his Solicitor continued for nearly about 3 years till the defendant filed its 2nd striking out application on 7th November 2016 as aforesaid, on the ground of non-prosecution and abuse of process of the court.
20. The plaintiff is the Captain of the Ship of litigation and it is his prime duty to prosecute his action with due diligence, leaving no room for inordinate delay, and without keeping the defendant on pins for a long period.
21. The reasons given by the applicant for the delay are;

- a. That he was unable to instruct the new solicitor as he kept liaising with his former Solicitor who, purportedly, advised him that he (solicitor) will not be able to carry on with the case and a new Solicitor has to be engaged.
 - b. That due to two Cyclones and flooding in Ba at the end of March 2018 he was unable to instruct his new Solicitors.
22. The above reasons are not valid and acceptable for his failure to file the application for leave to appeal within 14 days period, which expired on 16th March 2018, when counted from the date of Master's ruling on 2nd March 2018.
 23. The Cyclone and flooding, according to him, were at the end of March 2018 and it could not have precluded him from filing the leave to appeal application within the said time period, i.e. before 16th March 2018, as required by the High Court rules.
 24. Notably, the plaintiff need not have depended on his former Solicitor Mr. Sahu Khan, to file his leave to appeal application within the time period, since he had M/s. AC Law on record as his Solicitors, during the time material.
 25. Another reason adduced before the acting Master for the plaintiff's delay and failure to diligently prosecute the action was the retention of his files by the LPU, after being taken from his former Solicitor's office. But the letter dated 22nd March 2017 from the LPU addressed to the registry of this court shows that all his file were duly sent to the registry with the instructions to handover them to the plaintiff. This was in response to the plaintiff's letter dated 07th March 2017 sent to the LPU requesting the files. This need not necessarily have prevented the plaintiff from filing a timely leave to appeal application in relation to the impugned ruling pronounced on 2nd March 2018.
 26. The case record shows that there had been representation for the plaintiff by a senior counsel throughout the proceedings till 22nd May 2017 being the 1st hearing date, who claimed to be the *amicus- curiae* of the court. Objection

being raised on this by the learned defence counsel, the Acting Master did not permit the learned counsel to appear as the Master had not appointed or requested the learned counsel to appear as *amicus curiae*. This resulted in the adjournment of the hearing before the Master for the next day i.e. 23rd May 2017 and the appointment of M/s AC Law as his new Solicitors, who remained in record until a new appointment came in on 14th May 2018 along with the belated application for extension of time in order to file leave to appeal against the acting Master's ruling dated 2nd March 2018.

27. The reasons given by the plaintiff for the delay are not sufficient to consider the extension of time for granting leave to appeal out of time. Due to the inordinate delay on the part of the plaintiff, the possibility of having a fair trial for the defendant is doubtful. The defendant, being a commercial establishment, cannot preserve the documentary evidence and retain the witnesses with it for a long time, in order to face a protracted litigation.

The Chance of the Appeal Succeeding

28. The 3rd test is the chance of appeal succeeding, if the time for appealing is extended on the following proposed grounds of appeal.
1. *The Learned Master erred in law and in fact in failing to consider that the strike out of the Appellant's Claim renders the Appellant's Cause of Action statute barred pursuant to section 4 of the Limitation Act [CAP 35].*
 2. *The Learned Master erred in law and in fact in failing to consider the merits of the Appellant's claim prior to striking out the same pursuant to Order 25 Rule 9 of the High Court Rules.*
 3. *The Learned Master erred in law and in fact in failing to consider that the Respondent had full opportunity to prosecute its Counter-Claim pursuant to Order 15 Rule 2 (2) and (3) of the High Court Rules and therefore could have moved the matter to trial without waiting for the Appellant to prosecute his Claim.*
 4. *The Learned Master erred in law and in fact in failing to consider that the matter was at Copy Pleadings stage and in the interest of justice, it would have been practical to set a timetable for the matter to expeditiously move to trial rather than striking out the Appellant's Claim.*
 5. *The Learned Master erred in law and in fact in failing to consider that there existed no prejudice as there were separate Claims that existed in the substantive matter.*

6. *The Learned Master erred in fact and in law in failing to consider that the Respondent suffered no prejudice due to the delay as the Respondent by virtue of filing a Counter-Claim had full opportunity to prosecute its own Counter-Claim pursuant to Order 15 Rule 2 (2) and (3) of the High Court Rules.*
 7. *The Learned Master erred in fact and in law in granting costs in favor of the Respondent/Defendant had full opportunity to prosecute its Counter-Claim pursuant to Order 15 Rule 2 (2) and (3) of the High Court Rules rather than filing Order 25 Rule 9 application pursuant to the High Court Rules.*
29. The above grounds of appeal, in my view, are neither convincing nor meritorious. There is no a single acceptable ground of appeal to purge his inordinate delay in the prosecution of the action and his failure to file the application in hand within the time frame.

Prejudice to the Defendant:

30. It goes without saying the defendant will be prejudiced if the application is allowed. The plaintiff initiated this action in the year 2011 and had ample time and opportunity for him to prosecute his action with due diligence. The plaintiff, having set the judicial machinery into motion, failed to prosecute his action with due diligence and thereby burdened the system in terms of scarcely available resources and valuable time. Now the plaintiff is seems to be in an attempt to pin the blame on his previous Solicitor, who was suspended long time ago (in the year 2013) and on the natural disasters such as Cyclone and floods to cover up his deliberate failure.

Question of stay:

31. Since I am refusing to grant leave to appeal out of time, the question of stay of execution does not arise.

E. Conclusion:

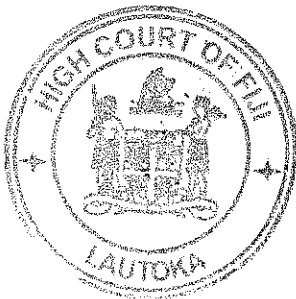
32. The delay was not explained satisfactorily. The proposed grounds do not disclose the prospect of success. The chances of succeeding in the appeal are unlikely, even if the time for same is extended. The defendant will be

prejudiced if the application is granted to restart a litigation which is 7 years old now.

33. In my view, the impugned ruling made by the Master appears to be a well-considered one on the subject of striking out and does not warrant intervention by a higher forum. I would, therefore, refuse to enlarge the time and to grant leave to appeal out of time the Master's ruling delivered on 2nd March 2018.

F. Final Outcome

- a. The application for the extension of time is refused.
- b. The application for leave to appeal out of time is refused.
- c. No order as to costs.



A. M. Mohammed Mackie
Judge

At Lautoka
10th December, 2018