

IN THE HIGH COURT OF FIJI
AT LAUTOKA
WESTERN DIVISION

APPELLATE JURISDICTION

Civil Appeal No - HBA 06 of 2018

**(On Appeal from the Decision
of the Magistrates' Court Nadi
delivered on the 11th October
2017 in Civil Action No. 92 of
2015)**

BETWEEN : **MATAIASI NABAU SAUKURU** in his personal capacity as well
as in his capacity as the representative of Tokatoka Erenu, of
Nawaka, Nadi, Farmer.

Appellant/Original Defendant

AND : **SIVAM & COMPANY LIMITED** a duly incorporated limited
liability company having its registered office in Nadi.

Respondent/Original Plaintiff

Counsel : **Mr. Jadhav Prashneel Prakashan for the Appellant**
: **(Ms.) Sonia Shivangi Lata for the Respondent**

Date of Hearing : **Wednesday, 30th May, 2018**

Date of Ruling : **Monday, 11th June, 2018**

R U L I N G

[1]. This is an appeal against the judgment of the Magistrates' Court at 'Nadi', delivered by the Resident Magistrate on the 11th October, 2017, in Civil Action No. 92 of 2015.

[2]. On the 24th April, 2015, the Respondent - Plaintiff issued the Writ in this action against the Appellant - Defendant in the Court below seeking following reliefs;

1. *The sum of \$31,000.00.*
2. *Interest on the said sum of \$31,000.00 at a rate of 10% per annum from the date of payment to the Defendant to the actual date of repayment but the total sum not exceeding the jurisdiction of the Honourable Court.*
3. *Punitive damages.*
4. *General damages.*
5. *Costs of this action.*
6. *Further or such other relief or remedy that this Honourable Court seems appropriate.*

[3]. What are the facts here?

The Statement of Claim which is as follows sets out sufficiently the facts surrounding this case from the Respondent – Plaintiff’s point of view.

1. ***That*** at all material times the Plaintiff has been carrying on business in Nadi.
2. ***That*** at all material times the Defendant has been or has held out to be the legal representative of Tokatoka Erenu, a Land Owning Unit.
3. ***That*** the Defendant by his agent invited the Plaintiff to inspect all that piece and parcel of land known as Koronilavalava (Pt of) contract no. 50039235 in the Tikina of Nawaka Code 108 in Ba Province known as 114/30101 belonging to Land Owning Tokatoka Erenu Mataqali Nalagi being Tokatoka No. 150 NLC 131 Sheet Ref – H/18-3 containing an area of more or less 2.5576 hectares and situated at Nadi Back Road, Nadi (hereinafter referred to as “the Property”).
4. ***That*** on or about the 7th day of March, 2014 the Defendant entered into a Sale and Purchase Agreement with the Plaintiff to sell the Property to the Plaintiff for a consideration sum of One Hundred and Twenty Thousand Dollars (\$120,000.00) (hereinafter referred to as the “Sale and Purchase Agreement”).

5. That the salient terms of the Sale and Purchase Agreement were:
 - 5.1 That the Defendant was the lessee of the Property under an Agreement to Lease issued by iTLTB to the Defendant.
 - 5.2 That the Defendant would sell and the Purchaser would purchase the Property zoned for either commercial or industrial purposes.
 - 5.3 That the Defendant would sell the Property for the sum of \$120,000.00.
 - 5.4 That the Plaintiff would pay a deposit of \$20,000.00 upon execution of the Sale and Purchase Agreement and the balance sum upon settlement.
6. That to induce the Plaintiff into entering the Sale and Purchase Agreement the Defendant by himself and by his real estate agent represented to the Plaintiff that:
 - 6.1 The Defendant had been issued an Agreement to Lease by iTLTB for the Property.
 - 6.2 That the Defendant would make arrangements with iTLTB and obtain the relevant consent to assign the Agreement to Lease.
7. That after the Sale & Purchase Agreement was entered into the Defendant as the Vendor and the Plaintiff as the Purchaser agreed to vary the said Agreement and it was agreed between the parties to the Agreement that the Defendant would arrange with iTLTB for a fresh Agreement to Lease to be issued in the name of the Plaintiff for Industrial purposes in exchange for which the Plaintiff would make installment payments to the Vendor so that the Vendor could pay iTLTB for obtaining the fresh Agreement to Lease.
8. That in accordance with the written Sale and Purchase Agreement and the above mentioned oral variation to the said Agreement between the Plaintiff and the Defendant between on or about the 27th day of March, 14 to on or about the 29th day of August 14 the Defendant received from the Plaintiff a total sum of Thirty One Thousand Dollars [\$31,000.00].
9. That in accordance with the said Agreements the Defendant and or his real estate agent arranged with iTLTB to issue an offer of an Agreement to Lease the Property to the Plaintiff and by a Lease Offer dated the 30th day of June, 2014 iTLTB offered to issue a Lease over the property to the Plaintiff.

10. ***That** upon receipt of the Lease Offer the Plaintiff and the Defendant together with the Defendant's real estate agent agreed that the Defendant would pay the amounts payable to iTLTB under the said Lease Offer and as such continued to receive part payment of the consideration sum under the Sale and Purchase Agreement and the variations thereto between the parties.*
11. ***That** in or about July 2014 the Plaintiff offered to pay the sum payable to iTLTB being the sum of Sixty Six Thousand Five Hundred and Fifty Six Dollars and Fifty Cents (\$66,556.50) if the Defendant agrees to have the sums deducted from the consideration sum as it was agreed between the Plaintiff and the Defendant.*
12. ***That** the Plaintiff arranged finance from his bank and prepared its cheque for the said sum of Sixty Six Thousand Five Hundred and Fifty Six Dollars and Fifty Cents (\$66,556.50) made payable to iTLTB but the Defendant and his agent advised the Plaintiff that they would make the payment to iTLTB and that the Plaintiff would only need to pay the Defendant.*
13. ***That** the Defendant and his agent subsequently advised the Plaintiff that they have already made the arrangements with iTLTB and that he did not need to pay iTLTB directly as per the above mentioned Lease Offer made to the Plaintiff.*
14. ***That** the Defendant has misled and misrepresented to the Plaintiff and has acted in a fraudulent and deceitful manner and wrongfully and unlawfully obtained money from the Plaintiff.*

PARTICULARS OF FRAUD

- (a) *Representing and or inducing the Plaintiff to believe that the Defendant had been issued with an Agreement to Lease by iTLTB for the Property.*
- (b) *Providing the Sale and Purchase Agreement which describes the Property to be under an Agreement to Lease.*
- (c) *Obtaining money from the Plaintiff by representing that the Defendant has been granted an Agreement to Lease from iTLTB.*
- (d) *Representing to the Plaintiff that the Defendant would obtain iTLTB consent for assignment of the Agreement to Lease.*

- (e) *Misleading the Plaintiff into believing that iTLTB had approved that it would issue a fresh Agreement to Lease for 99 years.*
- (f) *Representing to the Plaintiff to not pay iTLTB directly under the said Lease Offer and reassuring the Plaintiff that the Defendant had already made all the necessary arrangements with iTLTB.*
15. *That whilst the Defendant was still receiving money from the Plaintiff the Defendant made arrangements by himself and his agent to sell the Property to a third party.*
16. *That the Plaintiff relied on the misrepresentations made by the Defendant and acted upon the advice given by the Defendant.*
17. *That based on the assurances of the Defendant the Plaintiff paid the above mentioned money to the Defendant.*
18. *That the intentions of the Defendants were to induce the Plaintiff to act on their misrepresentations and pay money to the Defendant.*
19. *That in relying on the Defendant the Plaintiff materially altered his position in that he not only paid the monies aforesaid but also made arrangements to borrow money from his financier. Furthermore he paid interests from his financier for the money he paid and or alternatively was not able to invest the money in his business to make gains.*
20. *That the Defendant's aforesaid actions and or representations and or misrepresentations are wrongful and in fact unlawful and illegal.*
21. *That as a result of the Defendant's aforesaid wrongful and unlawful actions the Plaintiff has suffered loss and damages.*

PARTICULARS OF LOSS AND DAMAGES

- (a) *Total sum paid by the Plaintiff to the Defendant = \$31,000.00*
22. *That at all material times the Defendant knew or ought to have known that the Plaintiff was a business entity who would utilize the monies in its business.*
23. *That the Defendant has caused great inconvenience and hardship to the Plaintiff.*

[4]. The Court below decided the case in favour of the Plaintiff – Respondent and the judgment was delivered by the learned Magistrate on the 11th October, 2017. The learned Magistrate ordered the Defendant - Appellant to refund the deposit of \$32,000.00 to the Plaintiff- Respondent.

[5]. The Defendant challenges the Resident Magistrates’ decision. The Appellant - Defendant filed the ‘Notice of Intention to Appeal’ and also ‘Grounds of Appeal’ in the Magistrates’ Court on the 25th October 2017. His Grounds of Appeal are as follows;

1. ***THAT** the Learned Magistrate erred in law and in fact in not allowing the Appellants/Original Defendant joinder application as the contact between the party’s was drawing up by the common agent who also received the sum of \$32,000.00 on which \$20,000.00 was kept by the common agent as commission.*
2. ***THAT** the Learned Magistrate failed erred in law and in fact in awarding judgment in favour of the Respondent/Original Plaintiff when the matter before the learned Magistrate was the joinder application and whether the prior consent was mandatory on a sales and purchase agreement.*
3. ***THAT** the Learned Magistrate erred in law and in fact by awarding summary judgment in favour of the Plaintiff without first allowing the matter to go for trial.*
4. ***THAT** the Learned Magistrate erred in law and fact in interpreting the effect of Section 12 of the iTaukei Land Trust Board Act where there has been no transfer or dealing in the land subject of the sale.*
5. ***THAT** the Learned Magistrate erred in law and in fact in awarding the judgment sum of \$32,000.00 to the Plaintiff when the facts of the case warranted that the Plaintiff had breached the sales and purchase agreement.*
6. ***THAT** the Learned Magistrate erred in law and in fact in awarding the judgment sum of \$32,000.00 to the Respondents when there was no evidence that the property was transferred to a third party.*
7. ***THAT** the Learned Magistrate erred in law and in fact in holding that there was no consent by the iTaukei Land Trust Board to the sale and purchase agreement between the Respondent and Appellant when the iTaukei Land Trust Board gave an offer letter to the Respondent to purchase the property.*

8. ***THAT*** the Learned Magistrate erred in law and in fact in failing to consider that the Respondents had breached and frustrated the sales and purchase agreement and therefore are not entitled to the refund of the consideration price of \$32,000.00.

[6]. There is a '**preliminary objection**'. A preliminary objection to the hearing of the Appeal is raised by (Ms) Lata, Counsel for the Respondent. Counsel for the Respondent advanced an argument that the 'Notice of Intention to Appeal' was filed out of time and there was, therefore, in this case non-compliance with the provision in **Order 37, rule 1 of the Magistrates' Court Rules** which sets out the time within which Notice of Intention to Appeal shall be given. Counsel concludes by saying that the Appeal must be dismissed due to non-compliance with the mandatory provision in Order 37, rule 1 of the Magistrates' Court Rules.

The attention of the Court is called to ; **(1) Crest Chicken Ltd v Central Enterprises Ltd (2005) FJHC 87, (2) Tevita Fa t/a Tevita Fa & Associates v Trade winds Marine Ltd and Oceanic Developers (Fiji) Ltd, Civil Appeal No.: ABU 0040 of 1994, date of decision 18-11-1994 (3) Taylor v Waikohu County Council, (1922) NZLR 590 P.**

I closely read the three (3) judicial decisions cited by Counsel for the Respondent. They certainly appear to carry Counsel a good way in her argument. I see no reason to disagree with her submissions.

Moreover, during the course of argument, (Ms) Lata, Counsel for the Respondent, took me through a passage of 'Thompson' J in '**Tevita Fa t/a Tevita Fa & Associates v Trade winds Marine Ltd and Oceanic Developers (Fiji) Ltd** (supra)

The passage is this ;

'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 period but time-limits are set with the intention that they should be observed and even lateness of only a few days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August 1994.'

- [7]. I now turn to the Appellant. Indeed, Counsel for the Appellant, Mr Prakashan, frankly conceded that the 'Notice of Intention to Appeal' was filed out of time. Acknowledging the difficulty faced by the Appellant in this Court in the light of the authorities, Mr. Prakashan, however, submitted that the High Court has power to deal with the Appeal under Section 39 of the Magistrates' Court Act, even though the Appellant has not complied with the provision in Order 37, rule 1 of the Magistrates' Court Rules. In simplified form, Counsel contends that the High Court has jurisdiction to dispense with the requirements of Order 37, rule 1 of the Magistrates' Court Rules. Counsel concludes by submitting that the Appellant should be allowed to prosecute the Appeal.

Counsel for the Respondent resists the application.

- [8]. It is desirable to set out Order 37, rule 1 of the Magistrates' Court Rules in full.

It is as follows;

ORDER XXXVII.-CIVIL APPEALS

1.- Notice of Intention to Appeal

Notice of intention to appeal

1. Every appellant shall within seven days after the day on which the decision appealed against was given, give 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.

(Emphasis added)

- [9]. The wording of Order 37, rule 1 of the Magistrates' Court Rule is perfectly clear to me. The language is clear and distinct; **that the appellant shall within 07 days after the day on which the decision was given give Notice in writing of Intention to Appeal.**
- [10]. The learned Magistrate delivered the judgment on the 11th October, 2017. In terms of Order 37, rule 1, the time for giving Notice of Intention to Appeal then began to run from the 11th October, 2017. The Notice of Intention to Appeal was

filed in the Magistrates Court on the 25th October, 2017. It is no doubt quite clear that the Notice of Intention to Appeal was filed after the expiration of seven (7) days after the judgment was pronounced and the provision in Order 37, rule 1 of the Magistrates' Court Rules had not been complied with. It is perhaps worth adding that, there was before the Resident Magistrate no application by the Appellant for extension of time. It is a curious position. That causes me concern.

- [11]. As appears from the approach advanced for the Appellant, by Mr. Prakashan, Counsel for the Appellant, in the current climate, a vigorous attempt was made by the Appellant to invoke Section 39 of the Magistrates' Court Act to dispense with the mandatory requirements in the provision in Order 37, rule 1 of the Magistrates' Court Rules. Thus, this matter reduces to the question of the proper construction of Section 39 of the Magistrates' Court Act.

What is the rationale of the provision in Section 39?

In order to address Mr. Prakashan's argument based on Section 39 of the Magistrates' Court Act, it is desirable to cite Section 39.

Section 39 of the Magistrates' Court Act reads;

Discretionary power of Supreme Court

39. *Notwithstanding anything herein before contained, the Supreme Court may entertain any appeal from a magistrates' court, on any terms which it thinks just.*

- [12]. Of course, I unhesitatingly subscribe to the view that the High Court has general jurisdiction to deal with an Appeal from a Magistrates' Court, on any terms which the High Court thinks just.

However, the Appellant's argument misses the point. The fundamental point which this Court is concerned to underline is that the compliance with the requirements of the Order 37, rule 1 is **mandatory** and the High Court has no general jurisdiction to dispense with the mandatory requirement of the Rule pursuant to Section 39 of the Magistrates' Court Act. For my part, I am not prepared to subscribe to the view that in terms of Section 39 of the Magistrates' Court Act, everything is left to the discretion of the High Court on the wide basis. That is not the law established by an Act of Parliament. The scope of Section 39 is limited.

The Appellant's construction tends to make Order 37, rule 1 meaningless or ineffective. At this point, I cannot resist in saying that the Appellant's construction is certainly contrary to the apparent intention of the legislature and would indeed reduce Order 37, rule 1 to an absurdity. To be more precise, the Appellant's construction could defeat the obvious intention of the legislature and produce a wholly unreasonable result.

I must stress here that an intention to produce unreasonable result is not to be imputed to a Statute. Where possible, a construction should be adopted which will facilitate the smooth working of the scheme of the legislation established by the Act or Ordinance which will avoid producing wholly unreasonable result.

I cannot bring myself to think that the High Court has jurisdiction to dispense with the requirements of Order 37, rule 1 of the Magistrates' Court Rules by invoking Section 39 of the Magistrates' Court Act. To suggest to Court that the High Court has general jurisdiction to dispense with the mandatory requirement of Order 37, rule 1 of the Magistrates' Court Rules pursuant to Section 39 of the Magistrates' Court Act, stretches the judicial imagination quite unreasonably. Counsel goes beyond the scope and purpose of Section 39. I find the suggestion a source of amazement. The approach inherent in it was mistaken. In the current climate, the Rule and Section should at least be given its proper operation.

The language of Section 39 and Order 37, Rule 1 appears to me to present no difficulties of construction and to make clear the limitation of its scope. The Court's duty is to give meaning to Section 39 of the Magistrates' Court Act and Order 37, rule 1 of the Magistrates' Court Rules in the language in which it is expressed, to achieve its apparent purpose and to apply them to litigation in today's world.

- [13]. One word more, 'Notice of Intention to Appeal' within the exact terms of the provision in Order 37, rule 1 coupled with the 'Grounds of Appeal' is the very basis of the jurisdiction of this Court to deal with the Appeal. Without that foundation to work upon, the Court has nothing before it that is appealed against. It is really more than a mere technical non-compliance with the requirements of the Magistrates' Court Rules. It touches the very root of the Appellate proceedings. To be more precise, the objection goes to the very root of the Appellate proceedings.

I have no jurisdiction to hear the Appeal!

With respect, it is not the duty of the Court to look to the hardship of any particular case. The Court must decide upon the words alone of the Statute or the Rules.

I think, for these reasons, I hold that the preliminary objection to the Appeal is well founded. The objection goes to the foundation of the jurisdiction. That really concludes the matter and that the Appeal should be dismissed.

Let me add this. The objection to the Appeal is not purely technical. I think costs must be allowed.

- [14]. Finally and most significantly, right of Appeal is a 'Statutory Right' and the provisions in the Statute and the Court Rules must be strictly complied with. I am quite satisfied, so far as the provision in Order 37 rule 1 is concerned, that the Appellant is out of time. The provision in Order 37, rule (1) cannot be waived.
- [15]. I feel compelled to add that the need for and the importance of complying with the Rules were emphasised as far back as 1984 by the Fiji Court of Appeal in "Kenneth John Hart v Air Pacific Ltd", (Civil Appeal NO. 23 of 1983, Judgment delivered on 16th July 1984).

In 1995, the Fiji Supreme Court, the highest Court in the land warned; "*We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an Appeal*" See; Venkatamma v Ferrier – Watson, (Fiji Supreme Court Civil Appeal No. CBV 0002 of 1992, judgment delivered on 17th November 1995, at p.3 of the judgment.)

In August, 1997, the Fiji Court of Appeal in Rabuka v Dreunimisimisi (1997, FJCA 24) held as follows:-

"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in Venkatamma, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the Appeal."

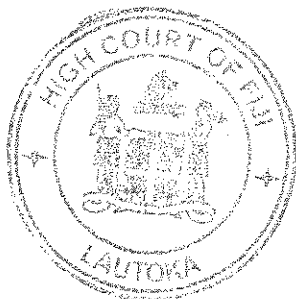
In the decision of the Privy Council in Ratnam v Cumarasamy and Another [1964] 3 All E.R. at page 935 ,Lord Guest in giving the opinion of the Board to the Head of Malaysia said, *inter alia*:

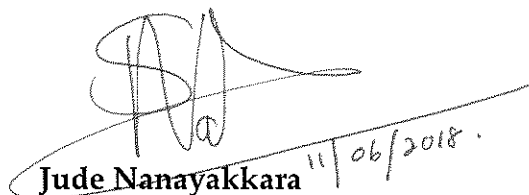
“The rules of court must, Prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified 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. The only material before the Court of Appeal was the Affidavit of the appellant. The grounds there stated were that he did not instruct his Solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of appeal was exercised on any wrong principle.”

(Emphasis added)

ORDERS

1. The preliminary objection is upheld.
2. The Appeal is hereby dismissed.
3. The Appellant is ordered to pay costs of \$500.00 (Summarily assessed) to the Respondent within 14 days hereof.




Jude Nanayakkara 11/06/2018.
Judge

At Lautoka
Monday, 11th June, 2018