

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No.: HBC 196 of 2014

BETWEEN : ANTHONY MARK VALENTINE and SHAINAZ ZAREENA BIBI VALENTINE both of Nakasi, Nausori Power Station Operator and School Teacher respectively.

RESPONDENT/ ORIGINAL PLAINTIFF

AND : MOHAMMED SHAFIK Lot 10 Calvert Place, Davuilevu Housing, Nausori.

APPELLANT/ORIGINAL DEFENDANT

Counsel : Plaintiff: Ms. Lutu . I
Defendant: Mr. A. K. Singh

Date of Hearing : 21.05.2019

Date of Ruling : 23.05.2019

JUDGMENT

INTRODUCTION

1. The Master had granted summary judgment on 28.05.2015. The cause of action related to a transfer of land and specific performance was sought and in summary judgment it was allowed. The Defendant filed an appeal against the said decision of Master and after fixing it for hearing it was withdrawn. Accordingly it was stuck off and dismissed. After dismissal of appeal there were several applications before Justice K. Kumar (presently ACJ) and they were also dealt. One such order made by His lordship was also appealed to Court of Appeal on 26.09.2018. Presently execution of Master's decision was also allowed as the stay application was also refused by Justice K. Kumar (as he then was). On 8.11.2018 present solicitor had filed notice of change of solicitors and he is seeking

extension of time to appeal against Master's decision of 28.5.2015 which was dismissed and struck off, without considering merits due to withdrawal on 23.9.2015.

ANALYSIS

2. The Defendant had already exercised his right of appeal and when the matter was fixed for hearing before Justice K. Kumar (as he then was) it was withdrawn by the then solicitors for the Defendant. The appeal against Master's decision of 28.5.2015, was dismissed and struck off.
3. So the Defendant had already exercised his right of appeal and it was dismissed without considering the merits. There is no explanation as to why it was withdrawn on 23.09.2015 having taken all the steps stipulated by High Court Rules of 1988.
4. If the Defendant failed to comply with the provisions contained in the High Court Rules of 1988 to diligently prosecute the appeal, a legal fiction is found in Order 59 rule 17(3) of High Court Rules of 1988, which makes the appeal deemed, abandoned. This is to stop abuse of process through inaction of the appellants to clog appeals unnecessarily. Such legal fiction also grants clarity and finality to a decision of the court made by Master. Certainty of a decision of court subject to appeal is a requirement of due process. But this does not allow to make an appeal and withdraw the appeal at hearing, and again seek to appeal after 4 years.
5. Once an appeal was made and it was fixed for hearing the appellant had already exercised the right of appeal granted by the High Court. If the appeal was withdrawn without any reason, it is presumed that Defendant's solicitors at that time considered the pros and cons of the prospects of appeal and withdrew it on the advice of the client. In such a situation Defendant should not be allowed to abuse the process and file a fresh appeal without a valid reason. So application for extension of time to file and serve notice of appeal should be dismissed *in limine*.
6. Defendant having exercised his right of appeal and having withdrawn the appeal at the hearing on 23.09.2015, should not be allowed to bring another appeal, without a valid and cogent reason, approximately after 4 years from the said withdrawal by the then solicitors. In the affidavit in support there is no such reason given. This application is nothing short of abuse of process for delay and or to cast uncertainty as to the decision of court.
7. If this practice is allowed it will pave way for abuse of process. High Court Rules of 1988 specifically prevented such abuse when it created a legal fiction by introduction of 'deeming' provision to make any unprosecuted appeal is deemed abandoned.

8. Already execution of the decision of Master was also granted, as the application for stay of the said execution was also refused by Justice K. Kumar (as he then was). A party who has deep pockets should not be allowed to come to court again and again on same matter.
9. There is approximately 4 year delay in this application from the date of Master's decision of 28.5.2015. Even if one were to calculate date from withdrawal of the appeal on 23.9.2015 delay is more than 3 years and 8 months, and the delay is inordinate and summons for extension of time needs to be struck off, without valid reason for such a long time.
10. Even if I am wrong on the above. There is no explanation of that delay by Defendant in the affidavit in support. In consideration for extension of time there should be an explanation as to the delay. When there is no explanation evident on the record or in the affidavit in support no extension can be granted.
11. *Order 59 rule 10 of High Court Rules of 1988 states:*
 - 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 the 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. So, where a party had not filed a Notice of Appeal within the time period stipulated in Order 59 rule 9 of the High Court Rules of 1988 may make an application for enlargement of time in terms of Order 59 rule 10(1) of the High Court Rules of 1988. Once a Notice of Appeal is filed within the time period and appeal proceeded to hearing, there is no issue of enlargement of time to file a second Notice of Appeal.
13. High Court Order 59 rule 17 lays down the procedure regarding an appeal from the Master and it states as follows:
Order 59 rule 17
 - (1) *The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit or service within 7 days of such service.*

(2) The appellant shall, within 21 days of the filing of notice of appeal, file and serve a summons returnable before a judge for directions and a date for the hearing of the appeal.

(3) If this rule is not complied with, the appeal is deemed to have been abandoned.'

14. In my judgment the appeal is deemed abandoned in terms of Order 59 rule 17(3) of the High Court Rules in terms of the legal fiction, prevents fresh application being made. Any other interpretation would make 'deeming provision' contained in Order 59 rule 17(3) redundant and superfluous.
15. This application for extension of time can be rejected on case management ground as well. Once a party had exercised right of appeal and withdrawn the appeal and had taken various other steps, after withdrawal, as in this case the right to appeal is already exhausted and question of a second notice of appeal will not arise.
16. After failure of all such avenues again the same party cannot be allowed to seek extension of time to file second notice of appeal, after lapse of 4 years, thus allowing uncertainly eroding finality of decision of the court, which had already been executed. If this is allowed a party can abandon any appeal at hearing and re start the process again thus wasting time and money of the parties and time and resources of the court.
17. There is no provision in High Court Rules to allow unlimited appeals against an order of the court, if this is allowed any decision of the court will be open for challenge at any time that will erode finality to a decision made 4 years ago and also already executed.
18. The rules of the court and procedural laws are all made for smooth functioning of the court system and also to provide optimum utilization of time and resources of the court in expeditious manner.
19. In my judgment the effect of Order 59 rule 17 (3) of High Court Rules of 1988, is that no fresh application for enlargement of time to file a Notice of Appeal regarding the same decision be logically allowed. If allowed it would create a mischief to the 'deeming provision'. Such an interpretation is not preferred. Whether the party had abandoned the appeal midway or withdrawn at the hearing unlimited number of notice of appeals cannot be made.
20. It should also be noted the contextual interpretation of the Order 59 rule 17(3) of High Court Rules also supports that no application for enlargement of time for a second Notice of Appeal, be allowed when an appeal is already withdrawn.


21. So in my judgment the application for enlargement of time to file second Notice of Appeal against the Master's decision should be struck off in *limine* without considering the merits as there is no provision in the High Court Rules of 1988 when the appeal was struck off and dismissed. Defendant had taken steps in the case after dismissal for over 3 years and having failed all of them he cannot be allowed to make a fresh appeal. This application is abuse of process and Plaintiff is awarded a cost of \$1,250, summarily assessed, to be paid by the Defendant.

FINAL ORDER

- a. Summons filed on 29.4.2019 is stuck off.
- b. Cost of this application is summarily assessed at \$1250 to be paid by Defendant to the Plaintiff.

Dated at Suva this 23rd day of May, 2019.




Justice Deepthi Amaratunga
High Court, Suva