

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

**CIVIL APPEAL NO. HBC 172 OF 2015**

(On appeal from the High Court of Fiji  
at Lautoka in the matter Civil Action  
No. HBC 172 of 2015)

**BETWEEN** : **RADHABAI** aka **RADHA BAI** of Malolo, Nadi, Domestic Duties  
as the Sole Executrix and Trustee in the Estate of Abhimanyou  
Lingam aka Abhimanyu Lingam late of Vuniyasi, Nadi, Market  
Vendor, Deceased.

**APPELLANT**  
**[Original Plaintiff]**

**AND** : **BALVEER SINGH** and **JAGINDRA SINGH** aka **JAGINDAR**  
**SINGH** Trustees in the Estate of Gurdiyal Singh aka Gurudayal  
Singh aka Gurdial Singh aka Hardayal Singh of Wailoku, Suva.

**RESPONDENTS**  
**[Original Defendants]**

**Appearances** : Mr R. Singh for the plaintiff/appellant  
Mr R. Charan for the defendants/respondents  
**Date of Hearing** : 18 July 2018  
**Date of Ruling** : 20 August 2018

## **R U L I N G**

[On Preliminary Issue]

### **Introduction**

[01] When the plaintiff/appellant's (*the appellant*) summons for direction seeking a date for the hearing of the appeal came up before me for hearing and direction on 18 July 2018, the defendant/ respondent (*the respondent*) raised a preliminary

issue. It is that the notice and grounds of appeal filed by the appellant is deemed abandoned as a result of the failure on the part of the appellant to file and serve a summons returnable before a Judge for directions and a date for the hearing of the appeal as required by the High Court Rules 1988, as amended ('HCR'), O 59, R 17.

## **Background**

- [02] The appellant brought an action against the respondent and claimed that the respondent whilst conducting the foreclosure on the subject land did not comply with the provisions of sections 73, 74 and 75 of the Land Transfer Act and section 79 of the Property Law Act. The respondent applied for striking-out of the claim. Having heard the application on 20 January 2017, the learned Master struck out the claim on the ground that the plaintiff's action was caught by the limitation provided in section 4 of the Limitation Act.
- [03] Having decided to appeal the Master's order, the appellant filed an application for leave to appeal. On 21 May 2018, I delivered a ruling on the appellant's leave to appeal application granting leave to appeal.
- (i) *Leave to Appeal the Master's decision of 20 January 2017 granted;*
  - (ii) *The Plaintiff must file and serve a Notice of Appeal within 7 days of the date of this Ruling.*
  - (iii) *The Plaintiff must file and serve a Summons to seek directions and a date for the hearing of the appeal.*
  - (iv) *The cost shall be in the cause.*

- [04] Accordingly, the appellant filed a notice of appeal on 21 May 2018. Thereafter, on 13 June 2018, she filed a summons pursuant to order 59 Rule 17 (2), HCR. The respondents raise a preliminary objection that the summons filed by the appellant is out of time that the appeal filed on 21 May 2018 is deemed abandoned.

## **The issue**

- [05] The preliminary objection raises an important issue that whether or not an appeal which is deemed abandoned can be reinstated and that whether there are any principles applicable to the issue.

## The Law

[06] The HCR, Order 59, Rule 17 provides:

### *“Procedure after filing appeal*

17. (1) *The appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of 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.”* (Emphasis provided)

## The applicable principles

[07] In a recent decision in *Sellink & Sellink* [2017] FamCAFC 30 (1 March 2017), the Federal Circuit Court of Australia considered the discretion by the Court when considering whether or not to allow the reopening of an Appeal in circumstances where it was deemed abandoned. In doing so, the Court referred to the case of *Joshua & Joshua* (1997) FLC 92-767, per Lindenmayer J, referring to McHugh J’s well known and frequently- cited judgment in *Gallo v Dawson* [1990] HCA 30; (1990) 93 ALR 479, was referred to. At 84, 440:

*“... the first and most important question to be determined upon such an application as this is whether the applicant has established that there is a substantial issue to be raised on appeal. If not, the application must fail. If so, then other considerations may become relevant to the exercise of the discretion, namely: the extent of the delay and the reasonableness of any explanations offered for it; any hardship or prejudice flowing to the respondent from the applicant’s delay which cannot be compensated for by orders as to costs or otherwise; and the desirability, in the public interest, that there be finality to litigation...”*

## Submissions

[08] Counsel for the respondent contends that: Pursuant to Order 59 Rule 17 (2) the appellant should have filed her summons by 11 June 2018. In this case, the summons was filed on 13 June 2018, which is 2 days after the mandatory time limit. He referred to two cases: *Saylesh Santu Prasad v Emosi Rabo & anor* – HBC 149 of 2013 and *Extreme Business Solution (Fiji) Limited v Formscaff (Fiji) Limited* Civil Appeal NO. ABU 0080 of 2016.

[09] In *Prasad* (above), where the summons for direction and a date for the hearing of the appeal was filed 38 days out of time, I said:

*(07) "...The deeming provision will operate automatically. The Respondents need not file an application to have the appeal deemed abandoned.*

*(08) The Summons for Directions is filed 38 days out of time. The Appellant has failed to file and serve the Summons for Directions within 21 days of the filing of the notice of appeal as required by rule 17 (2). This had led to activation of the deeming provision in rule 17 (3) .....*"

[10] The Fiji Court of Appeal in *Extreme Business Solution (Fiji) Limited* (above) said (at paragraphs 19 and 20):

*"19. Having said that, I now advert to Order 59 Rule 17 (1) of the High Court Rules which state thus:-*

*"17. (1) – The Appellant shall, upon serving the notice of appeal on the party or parties to the appeal, file an affidavit of service within 7 days of such service."*

*20. The above position is a mandatory provision statute which a Court is bound to take notice of. In other words, the Court cannot use its' discretion when the statutory provisions are mandated."*

[11] Counsel for the appellant, on the other hand, submits that: 2 day-delay has been admitted. The delay was not intentional. It was due to an oversight on our part. We are keen in prosecuting the appeal. The respondent will not be prejudiced by

the delay. The 2 day-delay in filing the summons for direction will not nullify the proceedings. O 2, R 2 catches all provisions. We have an arguable appeal. That is the reason for granting leave to appeal.

### **The decision**

- [12] Before me is a question whether the court has discretion to reinstate an appeal which had been deemed abandoned.
- [13] In this regards, the Federal Circuit Court of Australia (Full Court) in *Sellink & Sellink* (supra) has delivered a useful judgment. The Federal Court reinstated an appeal which had been deemed abandoned by reason of the admitted non-compliance with the direction made in respect of the appeal and set out the principles to be applied when considering an application to reinstate an appeal which had been deemed abandoned. Although this decision was made in relation to family case appeal involving issues of reinstating an appeal, the principles applied there appear to be common to other civil cases involving reinstatement of appeal which was deemed abandoned as well. I would like to think to apply those principles to the present application.
- [14] The respondent, raising a preliminary issue, contends that there is no appeal on foot as it had been deemed abandoned pursuant to O 59, R 17 (3).
- [15] It is submitted on behalf of the appellant that failure to comply with O 59, R 17 (2) will not nullify the proceedings as it is curable under O 2, R 2.
- [16] The appeal had been deemed abandoned by reason of the admitted non-compliance with the provision of R 17 (2) which says the appellant must within 21 days of the filing of notice of appeal, file and serve a summons for directions and a date for the hearing of the appeal. The appellant filed her notice of appeal on 21 May 2018. She filed and served the summons for direction as required by R 17 (2) on 13 June 2018, which is 2 days late. Rules 17 (3) deems an appeal abandoned if the appellant fails to file and serve the summons for directions within 21 days.

*What issues arise on the prospective appeal?*

[17] In the leave to appeal proceedings, I have considered the grounds of appeal. There were 5 grounds for appeal. I had found that there were substantive issues to be canvassed on the appeal and that the grounds had prospect of success, especially on the issues of law. The grounds alleged the court below had erred in law and in fact in holding that the action by the appellant is statute barred by virtue of section 4 (1) and (2) of the Limitation Act when section 8 (2) of the Limitation Act permits various actions dealings with foreclosure may be instituted within 20 years from the date the right to foreclosure accrued and in striking out the appellant's cause of action when a reasonable cause of action was pleaded on the grounds that the respondent had breached sections 73, 74 and 75 of the Land Transfer Act and section 79 of the Property Law Act when the respondent foreclosed on the land.

*Is it fairly arguable that the appeal has merit?*

[18] In my ruling of 21 May 2018, granting leave to appeal, I have determined that the grounds of appeal had merits and had real prospect of success (at paras 22 and 23):

*"[22] Where the argument involves a substantial point of law which does not admit of a plain and obvious answer, it may be best not to have it determined on a striking-out application. In the striking-out application, the Master had determined a limitation issue, a point of law when there were conflicting arguments as to the relevant provision applicable to the claim brought by the plaintiff. The plaintiff argued that section 8 (2) of the LA was the applicable provision as far as the limitation period is concerned, and not section 4 (2) of that Act as argued by the defendant. The point of law raised in the striking-out application does not admit of a plain and obvious answer. Therefore, it would be better deal with any substantial point of law as a preliminary issue.*

*[23] After hearing full argument on the proposed grounds of appeal, I am persuaded that the proposed grounds of appeal raise some arguable legal points and that there is a real prospect of success on an appeal."*

[19] Without prejudice to substantive argument, I provisionally hold that the appeal is fairly arguable and that it has merit.

*Is it fairly arguable that orders will be set aside?*

[20] The court below struck out the appellant's claim on the grounds of statute bar. The appellant had established a fairly arguable case of appealable error. If the appeal succeeds, the impugned order would be set aside.

*Prejudice to the respondent if the appeal is reinstated?*

[21] The delay is just 2 days. The respondent does not dispute the explanation for the delay. He points no hardship that cannot be compensated by an order for costs. Otherwise, justice points to an appeal being heard.

**Conclusion**

[22] I am persuaded to conclude that the court has discretion to reopen an appeal which had been deemed abandoned by reasons of non-compliance with directions or rules. The HCR, O 2, R 1 (which declares that the failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other aspect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein) and O 3, R 4 (which empowers the court to extend or abridge the period within which a person is required or authorised by these Rules, or by any order or direction, to do any act in any proceedings) supports this conclusion. In this instance, the appeal had been deemed abandoned by reason of non-compliance with R 17 (2) which deems an appeal abandoned if the appellant failed to file and serve a summons for directions and a date for the hearing within 21 days after filing notice of appeal. The appellant was 2 days late in filing the summons for directions required by that rule. The respondent did not point any hardship or prejudice flowing to him from the appellant's delay which cannot be compensated for by an order as to costs. Most significantly, the appellant has established, in the leave to appeal proceedings before me, that there were substantive issues to be argued on the appeal and which had real prospect of success. In the circumstances, it has

become relevant to the exercise of the discretion. I would, therefore, reopen the appeal which had been deemed abandoned by reason of non-compliance with R 17 (2). The respondent did not address the court on the issue of costs. Therefore, I decide to reserve the costs order.

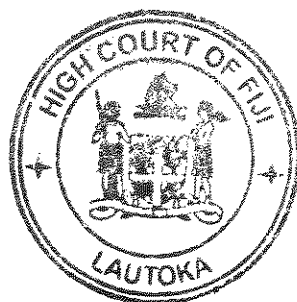
**The outcome**

1. Appeal reinstated.
2. The summons for directions filed by the appellant will proceed to hearing.
3. Costs shall be in the cause.

*M. H. Mohamed Ajmeer*  
20/8/18  
.....

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**

**20 August 2018**

Solicitors:

For the appellant: M/s Patel & Sharma, Barristers & Solicitors

For the respondents: M/s Sherani & Co