

IN THE HIGH COURT OF FIJI
AT SUVA - APPELLATE JURISDICTION

Civil Action No: HBA 08 of 2010

BETWEEN : ABHAY KUMAR SINGH practicing as A. K. Singh Law

Appellant

AND : MAHMOOD ALI KHAN

Respondent

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr A. K. Singh, the Appellant in person
Respondent absent

Date of Hearing : 20 April 2017

Date of Decision : 19 May 2017

DECISION

This is the Appellant's notice of motion seeking an order that the Appellant's appeal that was struck out by this court on 20 (sic) January 2016, on the basis of the non-appearance of the parties be reinstated.

1. The hearing was fixed before me for 20 April 2017. The Respondent was informed of this date by substituted service viz an advertisement in a local newspaper, but was absent.
2. The Appellant submitted at length on why the Magistrate was wrong in dismissing his claim against the Respondent/Defendant on 3 March 2010. He also gave the Court a potted history of what had transpired during the past 7 years.
3. At the conclusion of the arguments I informed I would take time for consideration. Having done so, I now proceed to deliver my decision.
4. It is trite law for any application, like the instant one, to succeed, the applicant needs to satisfy the Court of two things:
 - (1) That he has a valid reason for his absence on the original hearing date.
 - (2) That there are merits in the matter he is seeking to reinstate.
5. Taking (1) first, I note that the Appellant has not given the Court even the slightest hint of why he and/or his Counsel were absent in the Court on 21 January 2016 when the appeal was fixed for hearing at 9a.m. and struck out at 9.35a.m. because of their absence. The Appellant showed his cavalier attitude to this matter by getting the date wrong stating 20 January 2016 when it actually was 21 January 2016.
6. The fact that this application was filed on 26 January 2017, more than one full year later evinces the Appellant's lack of confidence in (2) to which I now turn.
7. The Judgment of the Magistrate on 3 March 2010 shows he grasped the pivotal issue here which is whether the agreed fees were in the instruction sheet when the Defendant (Respondent) signed the sheet.
8. The Magistrate who had the advantage of a trial court in assessing the veracity and the demeanor of the witnesses was not satisfied that this was so. He

believed the Defendant. There is no basis for an appellate court which has not got that advantage to disagree with the magistrate's finding.

9. This is especially so when the key witness, the law clerk, Racheal was not called by the Appellant to confirm that she witnessed the Defendant signing the instruction sheet **AFTER** all the fee amounts had been filled in. The record does not show that any reason was given to the magistrate as to why she was not called to give evidence when her evidence would have proved conclusive of the issue. To my mind, the issue of the handwriting expert was a red herring.
10. In the result, the Appellant has failed to satisfy me that he has a valid explanation for his absence on 21 January 2016 and that there are merits in his appeal.
11. I therefore dismiss the Notice of Motion filed on 26 January 2017 but shall, in the circumstances, make no order as to costs.

Delivered at Suva this 19th day of May 2017.



David Alfred

JUDGE of the High Court of Fiji.