

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Magistrate's Civil Action No.70 of 2013
High Court Appeal Action No 06 of 2018

BETWEEN : FOODS (PACIFIC) LTD

APPELLANT
(Plaintiff)

AND : SUVA CITY COUNCIL

FIRST RESPONDENT
(First Defendant)

AND : SHASHI KALA SHARMA

SECOND RESPONDENT
(Second Defendant)

Coram : The Hon. Mr Justice David Alfred

Counsel : Ms K. Singh for the Appellant
Ms B. Kuridrani for the First Respondent
Ms M Fong for the Second Respondent

Date of Hearing : 25 September 2018
Date of Judgment : 27 September 2018

JUDGMENT

1. This is the Appellant's Summons applying for an Order that the Appellant be granted leave to file and serve a Notice of Intention to Appeal and Grounds of Appeal out of time.
2. It is made pursuant to Order 37 Rule 4 of the Magistrates Courts Rules (MCR), and is supported by the affidavit in support of Jitendra Kumar (Kumar) who deposes as follows:
 - (1) He is a Manager of the Appellant.
 - (2) The judgment of the Magistrate was delivered on 31 October 2017 (judgment) whereby he dismissed the claim and awarded costs of \$750 to the Second Defendant.
 - (3) On 6 November 2017, the Plaintiff filed a Notice of Intention to Appeal.
 - (4) Since the file was handled by Messrs Parshotam Lawyers (PL), they wrote to them to uplift the file. However the file was only delivered to their office circa 14 March 2017 (sic, 2018) and it was delivered to Messrs Patel Sharma Lawyers (PSL) circa 20 March 2017 (sic, 2018).
 - (5) On 27 March 2018, PSL provided their opinion and noting it, the management of the Plaintiff on 6 April decided to appeal the judgment, and instructed PSL to file the necessary application.
 - (6) He is advised there has not been a considerable, inordinate or inexcusable delay in bringing this application as in any event there are merits in the grounds of appeal and if time is enlarged the (Respondents) will not be unfairly prejudiced.

2. The First Respondent's affidavit in objection is deposed by Bijay Chand (Chand) who says as follows:
 - (1) He is the acting Chief Executive Officer of the First Respondent.
 - (2) The transferring of the file from one law firm to the other is the sole responsibility of the (Appellant) to look into their solicitor's action instead of blaming them for the inexcusable delay.
 - (3) The service manager is not an expert witness to give evidence on the cause of damage to the Appellant's vehicle after it was towed.
 - (4) The Appellant is 7 (sic, 5) months out of time which is an inordinate delay. There is no sufficient explanation for the Court to grant leave to the Appellant.
3. The Second Respondent's affidavit in opposition is deposed by Ravikesh Sharma (Sharma) who says as follows:
 - (1) He is the managing director of the Second Respondent.
 - (2) The Appellant had given instructions for an appeal to be filed circa 6 November 2017 which is why a notice of appeal was duly filed. There is no explanation as to why the matter was transferred to PSL from PL, presumably on the Appellant's instruction.
 - (3) There is no specification on which date the Appellant wrote to PL to uplift the file or when instructions were given to PSL to take over from PL.
 - (4) He is advised that no evidence was led regarding the cause of the damage to the Appellant's vehicle and that the Magistrate had correctly concluded the Appellant had not led sufficient evidence to prove its claim.
4. The Appellant filed an affidavit in reply which is essentially reiterating what is contained in the affidavit in support.

5. The hearing commenced with Ms Singh submitting. She said the delay on the part of the Appellant was due to the conduct of its previous solicitors (PL). The notice of intention was filed in time but not the grounds of appeal. The repairman did not come to court to give evidence. If the appeal is allowed, there is no prejudice to the Respondents because there is no monetary award to them as the Plaintiff's claim was dismissed. There was no delay on the part of the Appellant itself but on the part of PL.
6. Ms Kuridrani then submitted. She said the delay was more than 5 months and blaming the solicitors is not a sufficient explanation for the purpose of granting leave.
7. Ms Fong finally submitted. She said a 5 months delay is not acceptable and the reasons for the delay were not given to the Court. No explanation was given why the grounds of appeal were not filed in time within a month. She said the Appellant failed to lead evidence that the damage was caused by either of the Respondents or how it was caused or what the vehicle's condition was before it was towed.
8. At the conclusion of arguments I said I would take time for consideration. Having done so I shall now deliver my judgment.
9. This appears to be a matter where for some inexplicable reason, the Appellant did not file the grounds of appeal within one month, as required by o.37 r 3 (1) of the MCR although PL had filed the notice of intention to appeal within 7 days of the judgment.

10. Kumar's affidavit in support makes it clear that no instructions were ever given to PL to file the grounds of judgment but only to uplift the file (see para 11).
11. Then in para 12, Kumar deposes that although PCL provided their opinion on 27 March 2018, the (Appellant's) management (only) decided on 6 April 2018 to appeal the said judgment. And, this when the Plaintiff was fully aware that the appeal had "to be filed within 28 days (sic, one month) of the Judgment" as stated in para 10 of his affidavit.
12. In : Jan's Rental Cars (Fiji) Limited AND Prema Nand AND Roger Lutz : Suva Civil Action No. HBM 147 of 2014 : Kumar J held a delay was not inordinate when the Applicant filed its application for extensive of time to file its notice of intention to appeal, 5 days after the prescribed time had expired (para 3.15).
13. Surely, then the delay here of the order of 5 months can only be considered as inordinate. More so in the absence of any reason for the Appellant's failure to give instructions to file the grounds of appeal by 30 November 2017.
14. I have perused the judgment and am satisfied there can be no merits in any appeal against it. I consider that Magistrate had carefully considered the matter and has lucidly and succinctly given the reasons for his judgment. In para 4 he states the service manager was not in a position to give evidence as to the cause of the damage. And in para 9, he states the (Appellant) had "not brought any evidence that 2nd defendants fault caused the damage to the vehicle".

15. At the end of the day there is no reason in law or in fact for the Respondents to be deprived of the fruits of the judgment which was the dismissal of the Plaintiff's claim against them.
16. In the result the Appellant's summons filed on 17 April 2018 is hereby dismissed and the Appellant is pay the costs of the same which is summarily assessed at \$500 to the First Respondent and at \$500 to the Second Respondent.

Delivered at Suva this 27th day of September 2018.



David Alfred

JUDGE

High Court of Fiji