

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0010 of 2014
(Suva High Court Civil Action No. 143 of 2011)

BETWEEN : **BAL CHAND**

Appellant

AND : **1. SALOCHNA LATA & MALKIT KUAR CHAND**
2. LEKH RAM

Respondents

Coram : **Calanchini, P**
Lecamwasam, JA
Alfred, JA

Counsel : **Mr. G. O'Driscoll for the Appellant**
Mr. A. Nand for the Respondents

Date of Hearing : **13 February 2018**

Date of Judgment : **8 March 2018**

JUDGMENT

Calanchini, P

[1] I agree that the appeal should be allowed and that the action be remitted to the High Court for a new trial with no orders as to costs.

Lecamwasam, JA

[2] This is an appeal by the First Defendant Appellant against the judgment of the High Court at Suva dated 13th February 2014. The learned Trial Judge allowed the Plaintiff's

claim by declaring the Will dated 10/5/2007 as the true and genuine Will of the Testator and has thereby rejected the Will dated 15/7/2010 on the basis that it was not an act of the Testator. Aggrieved by the said judgment, the Appellant has lodged this appeal on 13 grounds of appeal. These grounds are somewhat nebulous being inter-mixed with submissions of the Appellant. However, out of the extensive grounds of appeal, the 10th ground of appeal has the potential to decide the fate of this appeal, and therefore I append it in full below:

"10. Once my Council (sic) refused to represent my case 10 minutes before hearing I was confused and at the same time she approved (sic) and explained to the court that I did not pay any fees and she demanded \$2,100.00 to cover the legal fees. To my surprise my Council (sic) informed the Judge that my failure has result in her last minute pull out. But I have informed her that the hearing will take place on that day. She should have informed me of her unavailability 21 days before the hearing which she failed to do and was present on that same day. I have no time to look for a Council (sic). I was poor and cannot afford to pay for any cost."

- [3] The Appellant's grievance put succinctly is that he was not afforded an opportunity to retain a Counsel of his choice by not been given an adjournment to do so. This requires close perusal of the proceedings of Court on the day in question i.e. the 3rd February 2014.
- [4] From a perusal of the earlier proceedings on 1st October 2013, (p137 Record of High Court) it is evident that Ms N. Raikaci had initially appeared for the Appellant and had stated that she would be calling four witnesses.
- [5] Thereafter, the Learned Judge had fixed the case for hearing from the 3rd to the 7th February 2014 at 9.30 am. On 3rd February 2014, being the first day of hearing, Ms Raikaci being the Counsel for the Appellant had at the very outset sought to withdraw from the case stating that the Appellant requested her in writing not to appear. On being queried by the Judge, the Appellant had said that he had requested the lawyer not to appear and that he was ready for hearing, being assisted by a person (McKenzie friend).

Upon further query, the reason for the withdrawal of the lawyer seems to have been a dispute relating to counsel's fees.

- [6] Be that as it may, the sudden withdrawal of Counsel is sure to place a litigant in a helpless position, unless he is afforded adequate time and facilities for the preparation of his case.
- [7] I shall be failing in my judicial duties if I do not remind Counsel in general that any dispute relating to the payment of fees, by itself does not justify a Counsel's failing in his ethical duty to his/her client of continuing to represent him/her.
- [8] It is apparent the Counsel had made the application for withdrawal in the court, at the outset of the hearing. As the Appellant had intimated his intention to proceed sans legal representation, the court had proceeded to hear and to record the evidence of all five witnesses of the Plaintiff including an expert witness namely a Forensic Expert and the evidence of the Appellant himself.
- [9] It is pertinent to note that the observation made by Lord Lyndhurst in Harris v Osbourn 2 C & M 629, stated that: "*I consider that, when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it to its termination*". He proceeded to say "*I do not mean to say that under no circumstances can he put an end to this contract; but it cannot be put an end to **without notice***". These amply apply to the instant case.
- [10] The result was that in the hearing the Appellant had not cross examined two of the Plaintiffs witnesses at all, including the forensic expert and the cross examination of the other three witnesses of the Plaintiff was scanty.
- [11] In my opinion, an enhanced responsibility lies on the Court itself to assist litigants appearing in person. It should be borne in mind that our system of justice exists intrinsically to dispense justice with equity. Therefore in the instant matter before Court,

the learned High Court Judge ought to have exercised his discretion and granted an adjournment in light of the Appellant's predicament by the sudden withdrawal of his Counsel.

- [12] Whether the Appellant requested a new date or not, considering the circumstances, the learned High Court Judge should have given the Appellant an adjournment. As stated by the Court of Appeal in **Goldenwest Enterprises Ltd v Timoci Pautogo**, Civil Appeal No. ABU 0038.2005(3 March 2008): "... *that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter*".
- [13] Thus the court below should have given an adjournment to the Appellant in the interest of justice to avoid any prejudice to the Appellant. He was called upon to cross examine a forensic expert and four other witnesses. Even his own examination in chief was confined to a few lines only. All this amply shows his predicament. Had there been Counsel to represent him, I have no doubt he would have fared better.
- [14] The Learned High Court Judge failed to take into consideration that Ms Raikaci had not complied with O.67.r.6 (Of the High Court Rules) which provides as follows:

"Withdrawal of barrister and solicitor who has ceased to act for party (o67r.6)

6.(1) Where a barrister and solicitor who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change in accordance with rule 1, or notice of intention to act in person in accordance with rule 4, the barrister and solicitor may apply to the Court for an order declaring that the barrister and solicitor has ceased to be the barrister and solicitor acting for the party in the cause or matter, and the Court may make an order accordingly, but unless and until the barrister and solicitor –

(a) serves on every party to the cause or matter (not being a party in default as to acknowledgment of service) a copy of the order, and

(b) procures the order to be entered in the Registry; and

(c) leaves at that office a copy of the order and a certificate signed by him that the order has been duly served as aforesaid,

He shall, subject to the foregoing provisions of this Order, be considered the barrister and solicitor of the party until the final conclusion of the cause or matter.

(2) An application for an order under this rule must be made by summons and the summons must, unless the Court otherwise directs, be served on the party for whom the barrister and solicitor acted".

[15] Failure to follow the above rules caused grave injustice and irreparable loss to the Appellant. Whether an application was made by the Appellant or not, he should have been afforded an opportunity to retain another Counsel of his choice.

[16] In the result the judgment dated 13th February 2014 cannot be allowed to stand and is hereby set aside.

Alfred, JA

[17] I concur with the judgment of Lecamwasam JA.

Orders of the Court are:

1. *Appeal Allowed.*
2. *The Judgment and Orders dated 13th February 2014 are set aside.*
3. *The case is sent back to the High Court for hearing 'de novo' before another Judge.*
4. *No order as to costs.*



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W. Calanchini
Hon. Mr. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL

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Lecamwasam
Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

.....
D. Alfred
Hon. Mr. Justice D. Alfred
JUSTICE OF APPEAL