

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL NO. 28 OF 1992
(Civil Appeal No. 7/86)

BETWEEN

LUI FUNG CHAN LUM AS EXECUTRIX
OF THE ESTATE OF LUM BING WAI

Appellant

and

THE COMMISSIONER OF ESTATE AND
GIFT DUTIES

Respondent

Mr V. Mishra for the Appellant
Mr G.E. Leung for the Respondent

R U L I N G

(Chamber Application)

This is an application for leave to appeal out of time.

On 17.9.90 Jayaratne J. dismissed the Appellant's appeal (which was by way of Case Stated under Sec 55(3) of Cap 203) on the ground that neither the Appellant nor her counsel appeared on the hearing date.

On 1st of May, 1992 Scott J. refused an application by the Appellant to reinstate the appeal and extend time for making the application. There was a delay of 19 months in making the application. In dismissing the application Scott J. ruled as follows:

"There has been extreme dilatoriness by the Appellants who not only did not appear on the day the appeal was set for hearing but did not apply to set aside until March 1992.

The business of the Courts must be conducted with a degree of speed.

See Evans v Bartlam [1937] 2 All E.R. 646, 650."

On 21st of May, 1992 Messrs Mishra & Co sent a Notice of appeal to the Fiji Court of Appeal together with \$40.00 purporting to appeal against the decision of Jayaratne J. and the refusal by Scott J.

On 26th of May, 1992 the Appellant's solicitors Messrs Mishra & Co sealed the order of dismissal made by Jayaratne J.

Mishra & Co were notified that the appeal against Jayaratne J.'s order was out of time as the case stated was a civil appeal and therefore pursuant to Rule 29(4) of the Fiji Court of Appeal Rules time ran from the date of the decision and not from the time of sealing the decision. Therefore, the 6 weeks period as provided for under Rule 16(b) ran from the date of the decision, i.e. from 17.9.90 and had expired a long time ago. As a result of this view the Appellant filed a motion on 21st July, 1992 asking for leave to appeal out of time against the decision of Jayaratne J. as well as that of Scott J.

I am satisfied that the view taken by the Registry upon consultation was correct, i.e. that the Case Stated was indeed an appeal and therefore the 6 weeks rule from the date of decision applied.

Mr V. Mishra has argued that the case stated is in the nature of a case hearing rather than an appeal and, therefore, the six weeks period runs from the date of sealing of the judgment. Consequently, he submitted, no leave was necessary. With respect I cannot agree.

When one reads the whole of Section 55 of the Estate & Gift Duties Acts Cap 203 one cannot be left in any doubt that the Supreme Court (now High Court) exercises appellate jurisdiction when it adjudicates upon a Case Stated to it. In Section 55(3) the aggrieved party is referred to as "the appellant" and subsection (6) speaks of "the costs in any such appeal to the Supreme Court".

The sub-heading to Section 55 although not part of the statute is nevertheless reflective of and in consonance with the general scheme of the Case Stated procedure. It reads - "Appeal to Supreme Court from assessment of the Commissioner". Consequently, I rule that leave to file Notice of Appeal against Jayaratne J.'s Order is necessary.

As far as the Notice of Appeal against Scott J.'s decision is concerned it was lodged in time albeit as part of a Notice that was out of time. No leave is, therefore, required as to extension of time in respect of his decision.

As to merits of the application concerning extension of time to appeal against Jayaratne J.'s Order I am persuaded that the interests of justice require that such leave be granted. I note that the Appellant's main contention is that neither she nor her solicitors were served with a Notice of Hearing. Furthermore, Jayaratne J. did not deal with the merits of the Case Stated. For all practical purposes he merely struck out the Appeal for want of appearance. The Appellant contends that as soon as she came to know of the dismissal she took steps without undue delay to have the Case Stated reinstated. I cannot say that the proposed Grounds of Appeal are not arguable. I do not think the Commissioner of Estate & Gift Duties will really be prejudiced if time is extended. But I do not think that the indulgence should be granted unconditionally. I, therefore, grant leave on the following terms -

- (i) That the Notice of Appeal received by the Registrar on 21st May, 1992 against the Order of Jayaratne J. be now admitted as a valid Notice on payment of the requisite fee within 7 days, i.e. in lieu of the cheque for \$40.00 dated 20.5.92.

- (ii) That the Appellant pays all costs to date to the Respondent in any case in respect of appearances before Scott J. and myself and that an initial payment of \$75-00 be made within 7 days and the balance, if any, be paid in due course after taxation if the total sum is not agreed on.

- (iii) That this application will be deemed to be dismissed unless the terms imposed are complied with as ordered.

Before I conclude I must record my concern that Counsel for the Respondent who is also an officer in the Solicitor General's Department, has been mainly responsible for the delay in giving this Ruling. He failed to file written submissions by 18th September, 1992 in response to the submission filed by the Appellant on 3rd September, 1992, as was ordered by the Court. Notwithstanding a written reminder sent to him on 5.1.93 by the Registrar no written submissions were received as at the time of writing this Ruling.


Sir Moti Tikaram
Resident Justice of Appeal

Suva

26 January, 1993.