IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO: ABU 75 of 2013
(High Court HPP 3 of 2010)

BETWEEN : **PRANITA DEVI**

Appellant

AND : **MAYA WATI PRAKASH**

Respondent

Coram : Calanchini P

Counsel : Ms N Raikaci for the Appellant
Ms P Narayan for the Respondent

Date of Hearing : 18 August 2014

Date of Judgment : 5 September 2014

JUDGMENT

[1] This is an application by the Appellant for an order for an enlargement of the time in which a notice of appeal may be filed and served.

[2] The application was made by summons filed on 17 December 2013 and was supported by an affidavit sworn on 13 December 2013 by Pranita Devi. The

application was opposed. The Respondent filed an answering affidavit sworn on 11 April 2014 by Maya Wati Prakash. A reply affidavit sworn on 21 May 2014 by Pranita Devi was filed on behalf of the Appellant. Prior to the hearing of the application both parties filed written submissions.

[3] The Court's jurisdiction to determine this application is derived from section 13 of the Court of Appeal Act Cap 12 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act the power of the Court of Appeal to make such an order may be exercised by a single judge of the Court.

[4] The dispute between the Appellant and the Respondent concerns the estate of Salem Prakash Maharaj who died on 24 November 2008. The Respondent was the deceased's mother. The Appellant was married to the deceased and was granted Letters of Administration in his estate on 16 February 2009. Subsequently a Will executed on 22 December 2006 was discovered by the Respondent's daughter (i.e. the deceased's sister) on 23 January 2010. Under the Will the Respondent was the sole executrix and trustee of the estate and also the sole beneficiary of the estate.

[5] The Respondent (Plaintiff) commenced proceedings in the High Court seeking (1) a grant of probate of the Will of Salem Prakash Maharaj, (2) revocation of the Letters of Administration granted to the Appellant (Defendant) and (3) an account of the estate by the Appellant.

[6] The pre-trial conference minutes set out a statement of the agreed facts as follows:

> *"The deceased was the son of the Plaintiff.*
> *The deceased was married to the Defendant at the time of his death.*
> *The deceased died on 24 November 2008.*
> *On 16 February 2008 Letters of Administration was granted to the Defendant.*
> *On 23 January 2010 a will was discovered executed by the deceased.*
> *The will is dated 27 December 2006.*
> *The will was prepared by the office of Patel Sharma Lawyers."*

[7] It was also stated in the minutes that there were two agreed documents; first the Letters of Administration granted to the Defendant, and secondly the Will dated 22 December 2006 executed by the deceased and witnessed by 2 witnesses.

[8] The learned trial Judge granted probate of the Will to the Respondent and revoked the grant of Letters of Administration. The Judge also ordered that the Appellant provide an account of the estate within one month of the judgment. The Appellant was ordered to pay costs in the sum of $1500.00.

[9] In determining an application for an enlargement of time the Court has a discretion which must be exercised judicially. In **McCaig v Manu** (unreported CBV 2 of 2012; 27 August 2012) the President of the Supreme Court (Gates CJ) in delivering a ruling in a similar application set out the five factors that are usually considered to ensure that the judicial discretion is exercised in a principled manner. They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a ground of merit justifying the appellate court's consideration, (d) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed and (e) if time is enlarged, will the respondent be unfairly prejudiced?

[10] In the present case the length of the delay is determined by calculating the length of time between the last day on which the Appellant was required to have filed and served her notice of appeal and the date on which she filed and served her application for an enlargement of time.

[11] It is against the judgment of the High Court delivered on 11 October 2013 that the Appellant now seeks leave to appeal out of time. The Appellant filed the application for leave to appeal out of time by summons on 17 December 2013. There is no information before the Court to indicate when the application was served on the Respondent.

[12] Pursuant to Rule 16 of the Rules the Appellant was required to file and serve the notice of appeal within 42 days from the date on which the judgment in the High Court was pronounced. The effect of the Rule is that the Appellant was required to file and serve the notice of appeal on the Respondent by 22 November 2013. The

length of the delay in his case is at least the period between 22 November 2013 and the 17 December 2013, a period of 24 days. The actual delay is greater when the subsequent date of service of the summons on the Respondent is taken into account. In my judgment it is appropriate to consider the date of service in calculating the length of the delay since Rule 16 requires both filing and service of the notice of appeal to be effected within the prescribed time.

[13] The explanation for the delay is set in the affidavit in support filed on behalf of the Appellant. The Appellant deposes that she had not initially been informed by her legal practitioners that the judgment had been delivered. The Appellant became aware of the existence of the judgment on 19 October 2013. The Appellant deposed that she attended at the office of her legal practitioner on Monday 21 October 2013 to discuss the judgment.

[14] She states that she was told by her legal practitioner that he could not act for her in the appeal and that she should obtain legal representation from another lawyer for the appeal. It would appear she was given a copy of the judgment (minus some pages) and upon payment of $20.00 was handed some documents but not her file for which the legal practitioner required payment of his legal fees. It would appear that the Appellant eventually instructed her present Counsel but there is no reference in the affidavit as to when that occurred. The new practitioners informed the Appellant that they needed time to obtain copy documents from the court file and to research the law. It would appear that her new practitioners were not in a position to file and serve the notice of appeal within time and could only do so on 17 December 2013.

[15] The explanation is not acceptable. There was more than sufficient time for the new practitioners to file and serve a notice of appeal by 22 November 2013 and then if necessary to amend the notice in accordance with Rule 20 of the Rules without the leave of the Court at any time up to 14 days prior to the hearing of the appeal. A reasonable practitioner acting prudently could have complied with Rule 16 thus avoiding this application to single judge of the Court. It should not be assumed that an enlargement of time will as a matter of course be granted to a party to file and serve a notice of appeal. To do so would render the time limits prescribed by Rule 16 meaningless and would have the effect of unnecessarily prolonging indefinitely the

litigation process: **Vimal Construction and Joinery Works Ltd –v- Vinod Patel and Company Ltd** (unreported ABU 93 of 2006; 15 April 2008). It should also be noted that in this case the issues involved were not so complex that the new practitioners could not have filed and served within time a notice of appeal that would have alerted the Respondent as to the principal issues being raised in the appeal.

[16] The delay, although not inordinate is nevertheless substantial and since the explanation for that delay is less than satisfactory it is necessary to determine whether the Appellant has shown that her appeal has a reasonable chance of success if time is extended and the appeal proceeds (per Thompson JA in **Tevita Fa –v- Tradewinds Marine Ltd and Another** ABU 40 of 1994; 18 November 1994). In assessing the chances of success a judge of the Court in an application such as the present will not consider in detail the merits of any particular ground. It is not the task of the single judge to decide the appeal. The task is to form an overview of the appeal on the basis of the limited material that is available in the absence of the appeal record and to assess the chances of success.

[17] In her supporting affidavit the Appellant exhibited a draft notice of appeal listing a total of 11 grounds of appeal (after renumbering correctly) upon which she proposes to rely in the event that time is enlarged. They are:

> *1.* ***THAT*** *the learned trial judge erred in law and in fact in failing to properly and/or adequately evaluate and/or analyse the inconsistencies and contradictions in the evidence of the Plaintiff and her witness on the one hand with the evidence of the Defendant and her witness on the other, when arriving at his decision.*
>
> *2.* ***THAT*** *the learned trial judge erred in law and in fact in his failure to be vigilant when confronted with evidence sufficient to raise the Court's curiosity.*
>
> *3.* ***THAT*** *the learned trial judge erred in law and in fact when he failed to consider the suspicious circumstances surrounding the existence of the deceased's Will.*
>
> *4.* ***THAT*** *the learned trial judge erred in law and in fact in failing to properly consider that handwriting expert evidence in inconclusive and ought to have allowed further documentary evidence belatedly submitted on behalf of the Defendant on the*

actual signature of the deceased for comparison purposes on the authenticity of the deceased signature on the Will to support her claim of forgery.

5. ***THAT*** *the learned judge erred in law and in fact in taking irrelevant matters into consideration in arriving at his decision.*

6. ***THAT*** *the learned trial judge erred in law and in fact in that he did not properly construe nor did he give sufficient consideration to s.6 of the Wills Act, when considering the evidence as a whole, before arriving at his decision that the deceased's Will was a valid one.*

7. ***THAT*** *the trial judge erred in law and in fact in determining that since there is no allegation nor any evidence adduced by the Defendant on the due execution of the deceased's Will, it was not necessary for the Plaintiff to call either of its attesting witnesses to establish its due execution or its validity thereof, particularly when there is an allegation of forgery by the Defendant which undermines the due execution of the deceased's Will.*

8. ***THAT*** *the learned trial judge erred in law and in fact when he failed to place adequate weight on the allegation of forgery of the deceased's Will which had been the main issue of contention from the very outset.*

9. ***THAT*** *the learned trial judge erred in law and in fact when he failed to properly consider or give adequate consideration to the submission and case authorities tendered on behalf of the Defendant when arriving at his decision.*

10. ***THAT*** *the finding and verdict of the learned trial judge are unreasonable and cannot be supported having due regards to the evidence as a whole.*

11. ***AND UPON*** *such other and further grounds the Appellant thinks appropriate on receipt of the certified copy of the Court Record."*

[18] I do not propose to consider the grounds in any detail. It is sufficient to say that all but one of the issues raised by the pleadings were the subject of agreement in the pre-trial conference minutes. The only issue to which the parties did not make reference in the pre-trial conference minutes as either an agreed fact or as an issue to be determined was the issue of fraud in the form of an allegation raised in the Defence that the signature of the deceased on the Will was a forgery. It was a matter that the Appellant was required to establish by evidence to a standard that was at the higher end of the civil standard of proof. The learned High Court Judge concluded that the

evidence had failed to establish fraud. I have no difficulty in concluding that the Appellant has not established that she has a reasonable chance of succeeding on this ground.

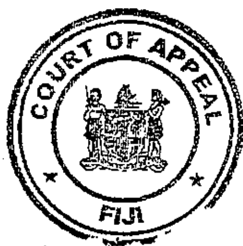
[19] Since the other grounds of appeal raise issues which were the subject of agreement between the parties in the pre-trial conference minutes the Appellant cannot be said to have a reasonable chance of succeeding on any of those grounds.

[20] As a result the application is dismissed and the Appellant is ordered to pay costs to the Respondent summarily assessed in the sum of $1800.00 to the Respondent within 28 days from the date of this judgment.

The orders of the Court are:

(1) The application for an enlargement of time to file and serve a notice of appeal is dismissed.

(2) The Appellant is to pay costs of $1800.00 to the Respondents within 28 days from the date of this judgment.



HON. MR JUSTICE CALANCHINI
PRESIDENT, COURT OF APPEAL