

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0003 OF 2014
High Court Case No. HBC 0005 of 2010

BETWEEN : **GREGORY CLARK**
Appellant

AND : **ZIP FIJI**
Respondent

Before : **Hon. Justice Almeida Guneratne**

Counsel : **Mr. D. Singh for the Appellant**
Mr. A. K. Narayan for the Respondent

Date of Hearing : **14 November 2014**

Date of Ruling : **5 December 2014**

RULING

[1] In this application the Appellant seeks leave to appeal notwithstanding the lapse of time, generally referred to as a leave to appeal out of time application and a stay of proceedings in respect of the judgment dated 6th November 2013 of the High Court in Suva. The application has been made pursuant to Section 20(1) (b).

The Matter of Leave to Appeal out of Time

- [2] Several threshold bars an applicant is required to overcome arise for consideration in this connection.

Length of Delay

- [3] The judgment of the High Court is dated 6th November, 2013 and the Summons for leave to appeal out of time is dated 19th June, 2014.
- [4] Thus, the delay is well nigh a period of 7½ months.

The Length of the Delay would be Dependant on the Peculiar Facts and Circumstances of each case

- [5] Past precedents of our Courts reveal that, the length of the delay would depend on the peculiar facts and circumstances of each case. It could be by just one day (at one of the spectrum) or a period of five years (at the other end).
- [6] I do not propose to crowd this order by embarking on an exercise surveying the past precedents in detail save as to say, in two other rulings, scheduled to be delivered on this very date (5th December 2014), I have done just that. (see: *Ghim Li Fashion (Fiji) Limited and Ba Town Council* ; Misc. Action No. 03/2012; 5th December, 2014) and *Nilesh Shalen Singh and Another v. Mohammed Khaiyab and 2 Others*; [Civil Appeal No. 9/2014, 5th December 2014].
- [7] However, for the purposes of this ruling I shall restate some of the criteria and principles I expounded therein (viz.)

Length of Delay in the Facts and Circumstances of the Case – Impossibility of Performance or Other Causes Akin to It

- [8] What if an Appellant was imprisoned or had been struck by some illness or had to change residence suddenly his lawyers being thus unable to communicate with him or he with his solicitors, until the due limit prescribed by law lapsed?
- [9] It is for such reasons that may recur like a decimal that, the length of delay cannot and ought not to be regarded on the basis of mere arithmetical delay.
- [10] Thus, the need to take into consideration the peculiar facts and circumstances of each case and even if such facts and circumstances do not amount to sufficient reasons for the delay, a Court would still be obliged to have regard to the criteria of the possible chances of success in the appeal should leave be granted. This has been the judicial trend of our courts.

Reasons (Excuse) for the Delay

- [11] That is the view I took in a ruling delivered on this very date (vide: *Nilesh Shalen's case (supra)*).
- [12] I now proceed to examine the reasons (excuse) for the delay urged by the Appellant.
- [13] The reason given on behalf of the Appellant is that his counsel was under the genuine and honest belief that the legal vacation was excluded in the computation of time to file a Notice of Appeal in the Court of Appeal similar to applications filed in the High Court. (vide: *Giesbrecht v. Cross* (2008 FJHC 356)).

Is a Genuine and Honest Belief of Lawyers Sufficient to Excuse Delay?

- [14] I do not for a moment doubt that it must have been due to a genuine and honest belief but there is no escape from the fact that, it was a mistaken belief as to the correct legal position.

The Principle Ignorantia Eorum Quae Quis Scire Tenetur Non Excusat

- [15] Here then is an instance where the aforesaid principle becomes applicable, that is, that, ignorance of those things which everyone is bound to know affords no excuse. As Lord Atkin in *Evans v. Barlan* [1937] AC 473 put it:

“the fact is that there is not and never has been a presumption that everyone knows the law. (But) there is the rule that ignorance of the law does not excuse, a maxim of law of very different scope and application” (at p.479) (The word But is an interpolation of mine).”

- [16] That principle must be applied with greater force in the case of lawyers. Laymen cannot be expected to know the law, for otherwise there will not be any need for a legal profession.

- [17] The harshness of the principle may be relaxed in a fit situation to laymen but ought not to be so where lawyers are concerned, at least, not to the same extent in its application to laymen.

- [18] This is the approach I adapted in another ruling delivered on this very date (vide: *Ghim Li Fashion (Fiji) Limited v. Ba Town Council (supra)*).

Consideration of the Judicial Decisions in *Avery v. No. 2 PSA Board* [1973] 2 NZLR 86 and *Gatti v. Shoosmith* [1939] 3 All ER 916

- [19] A belief seems to have been entertained in the legal circles in Fiji that, if a failure to appeal in due time was due to a mistake on the part of a legal adviser this *may* be a sufficient cause to justify the Court in exercising its discretion to allow an extension of time.
- [20] That belief appears to owe its genesis to the New Zealand decision in *Avery v. No. 2 PSA Board* (supra) which had referred to a statement made by Greene, M.R. in the English case of *Gatti v. Shoosmith* (supra).

What did Greene, M.R. opine in *Gatti v. Shoosmith*? (supra)

- [21] What did His Lordship, Greene, M.R. mean by “may be”? His Lordship said:-

“I say ‘may be’, because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think the proper rule which this Court must follow is: there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument”.

- [22] In *Gatti v Shoosmith* (supra) the appellant’s solicitors had given definite notice of their intention to appeal within time, and the notice of appeal, due to the misunderstanding on the part of a legal adviser, was served only a few days late. In *Lange v Town and Country Planning Appeal Board*; (1967) NZLR 915, there was a solicitor’s error of a few days only as regards the date by which security had to be given. Notice of appeal had been served within time and all the respondents

confidently expected that the appeal would be promptly prosecuted to a hearing right up to the last day when security might have been found. Leave to appeal was granted in both cases.

- [23] The instant case stands on an entirely different footing. Simply stated, the ground urged is that, the Appellant's lawyers, admittedly, were under the mistaken belief that, the period of the judicial vacation was not to be counted as regards the requisite period for computation of time.

Importance of not only the Substantive Law but also the procedural Law – the maxim *ubi ius ibi remedium*

- [24] There is substantive law and there is the procedural law. The maxim *ubi ius ibi remedium* reflects the complimentary character of the procedural law. It is by procedure that the law is put into motion.

Requirement of time limits – Procedural law

- [25] The Court of Appeal Act (Cap: 12 as amended), needless to say, is an act of the legislature. Time limits for filing an appeal are contained in the Court of Appeal Rules sanctioned by that very Act of the legislature.

- [26] Thus, the said rules pertaining to time limits as being part of the Procedural law are designed to represent the orderly and public functioning of the legal machinery.

- [27] Any notion of the procedural law being a mere vehicle in which parties should be safely conveyed on the road to justice, to my mind, is misleading, for it leads to the incorrect notion that, procedural law is of relatively minor importance and therefore could be disobeyed or disregarded with impunity.

[28] A mistaken belief as to the correct legal position on the part of lawyers cannot be condoned.

[29] True, a court of justice should not *per se* devote itself to procedures or ruthlessly sacrifice litigants to such procedures although parties on the road to justice may act recklessly for courts of justice are not academies of law.

[30] However, although an ordinary litigant may be shown indulgence to the maximum (an aspect I was influenced in *Nilesh Shalen Singh's case*) (*supra*), I am unable to adapt a similar liberal attitude where the lapse is on the part of lawyers based as it were particularly, as admitted, on a mistaken belief of the correct applicable legal position.

Re-iteration of the propositions stated in *Ghim Li case (supra)*

[31] For the purposes of this order, having gone through the grounds of appeal urged on behalf of the Appellant and the criteria of relative prejudice to parties, I am not convinced on either, and why I looked at the said grounds is purely out of deference and because of the judicial trend reflected in past precedents which I felt I was obliged to do.

[32] However, for my part, I re-iterate the rules I expounded in the *Ghim Li case* for the full Court or the Supreme Court to consider in the future in an appropriate case in my judicial quest to pre-empt a possible criticism levelled against my thinking based on inconsistency on account of the ruling in the *Nilesh Shalen Singh's case (supra)* on the other hand and the *Ghim Li case (supra)* on the other.

[33] The said propositions I expounded in the *Ghim Li case (supra)* which I reproduce for the purposes of this ruling are:-

- (i) *That, even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if the application for extension is to be granted, then the application must be rejected.*
- (ii) *That, even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless*
- (iii) *The reason for the delay is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers.*

Striking a via Media – Need to put the law on a definite Course

- [34] This is how I felt a via media could be struck in regard to applications for extension of time in an effort to put the law on a definite course.
- [35] While Proposition (i) should stand on its own, I have applied Proposition (ii) in a ruling that is being given on this very date. (vide: *Nilesh Shalen Singh etal v. Mohammed Khaiyub and others*; [Civil Appeal No. 09 of 2014, 5th December, 2014])
- [36] It is Proposition (iii) I adapted in the said *Ghim Li Fashion* case (supra) that I apply here as well.
- [37] At this point I must place on record the valuable assistance I received from learned Counsel for the Appellant and the Respondent by way of their written submissions and authorities cited, as well as their oral submissions.

Conclusion

[38] In conclusion, I refuse the application for extension of time.

[39] Consequently, I do not see any reason to consider the plea for a stay of proceedings.

The Orders in this Ruling are:

1. The application for leave to appeal is refused. There is no basis to consider a stay of proceedings.
2. The Appellant is ordered to pay as costs of this application a sum of \$1,500.00 (One Thousand Five Hundred Dollars) to the Respondent.
3. The said sum shall be in addition to the costs ordered by the learned High Court Judge in his Judgment dated 6th November, 2013.
4. The said sums shall be paid by the Appellant within 28 days of this Ruling.



Idet Guneratne

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL