IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0031OF 2016
[High Court Civil Action No. HBC 48 OF 2014]

BETWEEN	:	**MUNESH PRASAD**
		Appellant (Original Defendant)
AND	:	**RAJESH PRASAD**
		1st Respondent (Original 1st Plaintiff)
	:	**USHA PRASAD**
		2nd Respondent (Original 2nd Plaintiff)
Before	:	**Hon. Justice Prematilaka, JA**
Counsel	:	**Mr. I. Ramanu for the Appellant** **Mr. G. O'Driscoll for the Respondent**
Date of Hearing	:	**26 September 2015**
Date of Judgment	:	**30 September 2015**

RULING

Prematilaka JA

[1] The Appellant has initiated the present proceedings by way of Summons for Leave to Appeal out of time dated 19 April 2016 and Affidavit (sometimes called the 'Application for Leave to Appeal out of time') purportedly under Section 12 of the Court of Appeal

Act and Rules 26, 27 and 20 (1)(a) of the Court of Appeal Rules. The Appellant's Notice of Appeal had been filed against the Judgment of the Learned High Court Judge delivered on 02 December 2015. It is a final judgment and the notice of appeal had to be filed within 06 weeks [vide Rule 16 (b)]. The Appellant had filed it within that time. Section 12 of the Court of Appeal is not applicable in this instance and the correct legal provision is section 20 (1) (b) of the Court of Appeal Act. Rule 20 (1)(a) too has no application as it *inter alia* deals with amendment of notice of appeal. Since the present Application for Leave to Appeal out of time had not been made within the said 04 weeks time prescribed Rule 27 also does not come into play. Rule 26 is, however, relevant to the Appellant's Application for Leave to Appeal out of time. Therefore, I shall deal with this application under Section 20 (1) (b) of the Court of Appeal Act.

[2] The factual background leading to the Appellant's Application for Leave to Appeal out of time could be summarised as follows. The Appellant had filed a Notice of Appeal dated 16 December 2015 against the Judgment of the Learned High Court Judge dated 02 December 2015 which had been assigned Civil Appeal No.ABU 0088 of 2015. He had then filed a Summons to Fix Security for costs on 18 January 2016 in terms of Rule 17(1) (ii) of the Court of Appeal Rules with notice to the Respondents fixing the date on 02 February 2016.

[3] According to the Appellant his solicitor had attended the Registry for the hearing on 02 February 2016 but had been advised by a member of the staff that the Chief Registrar was away attending a swearing-in ceremony of a Judge at the Office of the President of the Republic of Fiji and a new date for the hearing would be communicated to his solicitor.

[4] I called for and examined the file at the Registry relating to Civil Appeal No.ABU 0088 of 2015 and there is no independent record of what transpired on 02 February 2016 except that a letter addressed to the Respondents' solicitors by the Registry on the same day had stated that the Chief Registrar had adjourned the inquiry into fixing the security for cost to be listed on 05 February 2016. However, there is no evidence in the file relating to Civil Appeal No.ABU 0088 that this letter had also been sent to the solicitors

for the Appellant or that the next date i.e. 05 February 2016 had been communicated to the Appellant or his solicitors. The Affidavit in opposition filed by the 2nd Respondent does not traverse the above account of the Appellant as to what happened on 02 February. Therefore, it is clear that the inquiry into fixing the amount of the security for costs had not proceeded on 02 February 2016 but had been adjourned to 05 February 2016. But, the question is whether the Appellant or his solicitors had been notified of the new date. On the material before me, I cannot conclude that the new date of 05 February had been communicated to the Appellant or his solicitors.

[5] There are two letters dated 12 February 2016 in the file relating to Civil Appeal No.ABU 0088 whereby the Registry had informed the solicitors for the Appellant and the Respondents that *'The matter was listed before the Chief Registrar on Friday the 05th day February at 9 a.m. for fixing of security for cost, where the Chief Registrar had dismissed the appeal due to no appearance from both parties.'* This is confirmed by the signed minuet sheet by the Chief Registrar himself on 02 February 2016. The Counsel for the Respondent admitted having received this letter but the Counsel for the Appellant was not aware of it as there had been a change of solicitors for the Appellant in between. However, I find from the file relating to Civil Appeal No.ABU 0088 that Naipote Vere & Associates, the solicitors for the Appellant had acknowledged the receipt of the said letter on the same day i.e. 12 February 2016 with a rider 'without prejudice'.

[6] The Appellant further states that the Solicitors had filed Summons to re-instate the application dismissed by the Chief Registrar on 10 March 2016 which had been heard on 22.03.2016 and dismissed by the Chief Registrar who had allegedly advised the Appellant to file an application to file an application to tender the Notice of Appeal out of time. However, the signed minute sheet on 22 February 2016 reveals that the Chief Registrar had noted that the Appellant had filed an action to re-instate the appeal and he had failed to file the Summons for security for cost within the stipulated time. The Registrar had further noted that the appropriate solution for the Appellant is to seek an extension of time to file an appeal and both parties agreed to follow that. Therefore, it appears that the solicitors for both the Appellant and the Respondents had agreed to what the Registrar had suggested. The Registrar had not made any specific order dismissing the Summons to re-instate the Summons for Security for Cost

[7] Nevertheless, I have not been able to trace any action to re-instate the appeal filed by the Appellant up to that time. Yet, the Chief Registrar's observation that the Summons for security for cost had not been filed within the stipulated time appear to be correct and in which event the Appellant's appeal should have been deemed to have been abandoned in terms of Rule 17(2). No fresh notice of appeal had been filed either within the stipulated time. Therefore, the Registrar could not have in any event proceeded with the inquiry to fix the amount of the security for the prosecution of the appeal either on 02nd or 05th February 2016. This, perhaps, may be the reason why the solicitors for both parties had agreed that the proper procedure is to file an appeal out of time with leave of the Court of Appeal. In those circumstances, whether the solicitors for the Appellant had notice of the hearing before the Chief Registrar on 05 February 2016 pales into insignificance.

[8] Therefore, I have to consider the present Application for Leave to Appeal out of time as any other application made under section 20 (1) (b) of the Court of Appeal Act to extend the time within which a notice of appeal may be given. The judicial pronouncements on section 20(1)(b) of the Court of Appeal Act have given guidance as to the principles that may be adopted in the case of Applications under section 20(1) (b).

[9] **Sundar v Prasad Civil** Appeal No. ABU0022 OF 1997:10 November 1997 [1997] FJCA 39 it was held:

'The factors that are normally taken into account when dealing with an application for leave to appeal out of time are -

(a) the length of the delay;

(b) the reasons for the delay;

(c) the degree of prejudice to the Respondent if the application is granted;

(d) the prospect of the intended appeal succeeding if application is granted.

Nevertheless in the last analysis a Court cannot overlook a determining factor namely that an Appellant will or is likely to suffer an irreparable serious injustice if an extension is not granted.'

Whilst a delay of 3 months might have been reasonable in this case, the delay of over 6 months has not been satisfactorily explained. Nor can I rule out a certain amount of prejudice to the Respondent if leave is granted.'

[10] The criteria laid down in ***Sundar*** has been followed in **The Official Receiver v. Petrie Limited** Civil Appeal No. No. ABU0049 of 1997: 28 November 1997 by Sheppard J.A., by Byme, JA in **Bank of Baroda v Champaneri** Civil Appeal No. ABU0028 of 2001: 18 January 2002 [2002] FJCA 92 and **Datt v. Datt** Civil Misc. Action No. 33 of 2001: 07 June 2013 2013] FJCA 58.

[11] ***Datt*** has quoted several previous decisions and set out a few other grounds as well. They are as to whether the appeal raises

(i) Issues of general importance

(ii) Important questions of law

(iii) Issues that in the interest of justice should be considered by the Full Court.

[12] **Avery v. No. 2 Public Service Appeal Board and Others** (1993) 2 NZLR 86 the New Zealand Court of Appeal stated per Richmond J. as a general principle at p.91:

"When once the Appellant allows the time for appealing to go by, then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."

[13] Once a claim is brought to court, the litigants must be prepared to see it to the end. In **Registrar of Titles v. Sharda Prasad** (Supra) Shameem J. said:

"The new rules send a clear message to all prospective Appellants - it is the Appellant's duty to file appeals, and to take all steps to push the appeal to a hearing."

The length of the delay.

[15] I do not think that there is any unreasonable, inexcusable and inordinate delay in making the Application for Leave to Appeal out of time so as to defeat the Appellant's present Application on that score, though I do not accept the explanation for the delay as being the interruption of power supply to the solicitors as a result of Cyclone Winston. The last proceeding before the Chief Registrar was on 22 March 2016 and the present Application had been filed on 19 April 2016. Until 22 March 2016 all parties and even the Chief Registrar had acted as if there was a valid appeal afoot when there was none. I do not think the delay, if any, would fall into the category of 'inordinate' and 'inexcusable' delay as explained below.

'Inordinate.....means so long that proper justice may not be able to be done between the parties. When it is analyzed, it seems to mean that the delay has made it more likely than not that the hearing and or the result will be so unfair vis-à-vis the Defendant as to indicate that the court was unable to carry out its duty to do justice between the parties.'

...Inexcusable means that there is some blame, some wrongful conduct, some conduct deserving of opprobrium as well as passage of time. It simply allows the judge to put into the scales the Plaintiff's conduct or reasons for not proceeding, as well as the lapse of time and the prejudice that would result to him from denying him opportunity from pursuing the action or perhaps any action against the defendant.'

The reason for the delay

[16] As I have already held there is no unreasonable, inexcusable and inordinate delay in making the Application for Leave to Appeal out of time so as to defeat the Appellant's present Application, I need not consider the question of reason for the delay but I have already indicated that I am not satisfied with the excuse for the delay placed before this Court by the Appellant.

The degree of prejudice to the Respondent if the application is granted

[17] In the aforesaid circumstances, I am of the view that it will cause a substantial prejudice to the Respondent if the Appellant's present application is allowed, for the reason that the Respondents being the original Plaintiffs have been declared to be entitled to obtain

vacant possession of the property concerned by virtue of the High Court Judgment on 02 December 2015. The Appellant had apparently not complied with orders of cost to be paid to the Respondents in sums of $1500 in the main Judgment and $1500/- in the stay of execution proceedings by the High Court. The Respondents have been denied the fruits of their victory and I am concerned with this aspect, particularly given that fact that there does not seem to be any reasonable prospect of the Appellant succeeding in his appeal. I shall consider this aspect in detail in the succeeding paragraphs.

The prospect of the intended appeal succeeding if application is granted

[18] In his affidavit dated 16 April 2016 the Appellant had stated that he has a good prospect of success in his appeal against the High Court Judgment. The Appellant's original affidavit, the affidavit in opposition of the Respondent dated 27 May 2016 and the affidavit in reply by the Appellant dated 27 June 2016 refer to High Court Civil Action HBC 48 of 2014 where the Appellant was seeking a stay of execution of the order for vacant possession. The Learned High Court Judge had refused the Appellant's Application. Thereafter, the Appellant had filed a Notice of Appeal dated 26 May 2016 against the said Judgment in the Court of Appeal under Civil Appeal ABU No.0057 of 2016 which had been struck out for non-prosecution on 15 June 2016 subject to the payment of cost of $1500. Thereafter, the Appellant filed Summons and affidavit on 23 June 2016 in the present proceedings under ABU 0031 of 2016 seeking an interim stay of execution of the decision in HBC 48 of 2014 which, I am informed is still afoot pending the outcome of the present Application for Leave to Appeal out of time.

[19] I have perused the material placed by the Appellant to buttress his argument that he has a good prospect of success in the appeal against the Judgment in HBC 48 of 2014. I am persuaded to adopt the reasons for refusing the stay of execution by the Learned High Court Judge as she has succinctly stated why she was not inclined to grant a stay of execution in favour of the Appellant. I quote

'Be that as it may, on merits, I do not find the appellant's argument that the respondent's title to the land can be impeached tenable. This is the only argument that the applicant had raised before the trial Court when he was asked to show why an order for vacant possession should not be made against him. He had stated that the respondent's became the registered proprietor of the property by fraud.'

'The respondents are registered proprietors of the land and the title they hold is not impeachable unless actual fraud can be shown by the applicant and no evidence of actual fraud had been provided to the trial Court or has been put forward before me. The applicant is merely speculating or asking the Court to imply fraud on the part of the applicant.'

'It is speculated by the applicants that since the respondents bought the land from the Bank at a higher price than what the applicant offered, they induced the mortgagee bank to sell the same to them instead of the applicant who had from the bank an unexecuted sale and purchase agreement.'

'....If the respondents's higher offer got accepted, that is not implication of fraud on their part. There has to be actual fraud shown and I reiterate that no such evidence was provided to the trial judge.'

'The applicant also implies fraud on the part of the respondents in that they caused the caveat on the property lodged by him to be improperly removed.'

'If the caveat on the property is improperly removed, the cause of action lies against the Registrar of Titles..... The removal of the caveat is a mere speculation of fraud which is not sufficient to hold the respondents from the right to use and occupation of their property.'

'Since the applicant could not establish fraud on the part of the respondents, the order for vacant possession was granted. I do not have any material evidence to convince me that there was an arguable error of law or fact made by the Court when it made an order for vacant possession against the applicant.'

[20] I have examined the Judgment of the High Court dated 02 December 2015 and agree with the sentiments expressed above. The High Court Judge in the said Judgment had concluded that the Respondents' title to the subject matter could only be defeated on the ground of actual fraud and that there was no evidence produced to court which showed any form of fraudulent conduct on the part of the Respondents. In the absence of any material to the contrary, I am disposed towards agreeing with the Judgment of the High Court. Moreover, the Appellant has not placed any fresh material before this Court for me to take a different view from what had been lucidly stated by two High Court Judges as stated above.

[21] Therefore, in my view the prospect of the appeal succeeding even if the present application is granted is minimal.

Irreparable serious injustice

[19] I have also considered whether the Appellant would or would be likely to suffer an irreparable serious injustice if his Application for Leave to appeal out of time is not granted. In my view, this consideration is intrinsically interwoven with the previous aspect of the prospective success of the appeal and in the light of my finding that such prospect is minimal I answer this query also in the negative.

[20] Before disposing of this matter, I have not forgotten to consider whether there are issues of general importance, important questions of law and issues that in the interest of justice should be considered by the Full Court as prescribed in **Datt v. Datt** (supra). Unfortunately, I have not been able to trace any such issues of general importance or important questions of law involved here. Neither have I been able to find any issues that warrant the attention of the Full Court.

[22] In the circumstances, I am not inclined to allow Appellant's Application for Leave to Appeal out of time.

[23] Therefore, I proceed to make the following orders:

1. The Application for Leave to Appeal out of time is refused.

2. The Appellant is ordered to pay $ 1800/- as cost of this Application to the Respondents.

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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL