

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

**CIVIL APPEAL NO.ABU 0014 OF 2016**  
**(High Court Civil Case No. HBC 08 of 2009)L**

**BETWEEN** : **ABDUL MUNAF**  
*Appellant*

**AND** : **TAHIR HUSSAIN MUNSHI**  
**KHAIRUL NISHA BIRIBO**  
*Respondents*

**Before** : **The Hon. Justice Almeida Guneratne**

**Counsel** : **Mr. E. Maopa for the Applicant/Defendant**  
**Ms. R. Naidu for the Respondents/Plaintiffs**

**Date of Hearing** : **14 September, 2016**

**Date of Ruling** : **26 September, 2016**

**RULING**

**Nature of the present application**

- [1] This is an application under Section 20(1) (b) of the Court of Appeal Act (Cap, 12) for extension of time to appeal against the judgment of the High Court dated 17 November, 2015.
- [2] I shall refer to the relevant facts when dealing with the appropriate criterion in order to avoid repetition.

- [3] The applicable criteria have been laid down in a plethora of past precedents. They are:
- (a) The length of the delay
  - (b) The reasons adduced for the delay
  - (c) The chances of an applicant succeeding if time for appealing is extended
  - (d) The degree of prejudice caused to the respondent should the application be allowed.
- [4] For the present purposes I shall refer to some of the said precedents viz: **Peter Sujendra Sundar v. Concave Investment Ltd & Chandrika Prasad** [1997] ABU 22/97.

**Bank of Baroda v. Mohanlal Champaneri**

[2002] ABU 28/01

**Bahadur Ali & Others v. Ilaitia Boila, Chirk Yam & Others**

[2002] ABU 0030/02

- [5] The case law reveals other adjunct criteria as well. They are:
- (i) Whether the appeal raises issues of general importance [see: **Native Land Trust Board v. Lesavua & Subramani** Misc. Action No. 1 of 2004]
  - (ii) Whether the appeal raises important questions of law (vide: **Beci & Others v. Kaukimoce & others**, [Misc. Action No. 2 of 2009])
  - (iii) Whether there are issues for the Full Court to consider in the interest of justice (vide: **Narayan v. Narayan** [Misc. Action No. 14 of 2009])

- [6] The aforementioned precedents have been cited in the single Judge ruling in **Raj Datt v. Suni Datt** (Misc. Action No. 33 of 2011, Minute of 7 June 2013 per Calanchini, A.P.)
- [7] There could be other factors that may be added to the aforementioned criteria such as:
- (i) the background history of the matter
  - (ii) the conduct of the parties
  - (iii) whether there was impossibility of performance to meet the statutorily decreed time limit in filing a petition for leave to appeal. (see the Ruling of this Court in **Nilesh Shalen Singh & Another v. Mohammed Khaiyub and two others**, Civil Appeal No. 09/2014, Minutes of 5 December, 2014.
- [8] Having said so, on an examination of past precedents, it would appear that the approach of this Court has been that, even if criteria (a) (b) and (d) are not met, criterion (c) is to be regarded as the decisive criterion. (see: **Tevita Fa v. Tradewinds Marine Ltd. & Another**, ABU 40 of 1994, Minutes of 18.11.94).

#### **Length of the delay**

- [9] The Judgment of the High Court was delivered on 17 November, 2015. The Appeal originally was filed on 21 December, 2015 which had been abandoned on 29 January, 2016. If one were to ignore the lapse on the applicant's part in the matter of furnishing security for costs as required by **Rule 17 (3)** of the Court of Appeal Rules and the fact that the present application having been filed within 32 days after the abandonment of the original Appeal, having regard to the impacting provisions thereon as to time limits, I hold that whatever the delay was, that *per se* is not a criterion to hold against the Applicant for the reasons I have articulated at paragraph [5] above in this Ruling.

#### **Reasons for the Delay**



- [10] The reason adduced is that the Solicitors office was closed for the legal vacation. The legal vacation only applies to High Court matters and not to matters of the Court of Appeal. The Practice Direction No. 1 of 2012 is clear on that matter. I myself have made certain Rulings on that aspect. (Vide: **Ghim Li Fashion (Fiji) Limited vs. Ba Town Council** Misc. Action, No. 03 of 2012, Minutes of 5 December, 2014 and **Gregory Clark v. Zip Fiji** (Civil Appeal No. ABU 3 of 2014, Minutes of 5 December, 2014).
- [11] In those Rulings I had taken the view that, a misconstruction of the said Practice Direction on the part of lawyers cannot be accepted as an acceptable excuse for any delay for the reasons stated in those Rulings.
- [12] However, that does not appear to be the real reason which the applicant has urged in the present case. Perhaps, well informed in regard to the said Rulings, the Applicant's contention appeared to be that, his solicitors office was closed for the legal (High Court) vacation, thus, to my mind, taking refuge in "the doctrine of impossibility of performance" which had been articulated by me in **Nilesh Shalen Singh's Cafe** (supra) referred to in paragraph (4) above in this Ruling.
- [13] On the one hand, it could be argued that if a party chooses lawyers who close their offices for the High Court vacation then he must take the consequences if the decreed statutory limits could not be satisfied. On the other hand, ought not that be an acceptable reason for excusing the delay? In that context I have given consideration to the Applicant's affidavit dated 17 February 2016 as well.
- [14] Thus, being of the view that, the applicant has surmounted the criteria of length and reasons for the delay, I now move onto the criterion viz: the chances of the Applicant succeeding if time for appealing is extended.

**The Criterion of the Appeal succeeding if time is extended**

[15] To begin with, I am unable to agree with M/S Naidu's contention that the Applicant has not stipulated as to on what basis that criterion is urged.

[16] I found that, the Applicant has urged two very strong grounds in that regard viz:

(a) That, there was 'fraud'

(b) That, there were implications of Section 59 of the Indemnity Guarantee and Bailment Act impacting on the case.

**Re: The Matter of 'Fraud'**

[17] Mr. Maopa for the Applicant referred me in that connection to the Applicant's supporting affidavit (AM2).

[18] However M/S Naidu's submission was that, in so far as she was aware that had not been taken as a possible defence at the trial in the High Court.

[19] Given the fact that, on my asking both counsel as to whether they had any objection if I were to call for the pleadings in the High Court to ascertain whether the said defence had been taken, for the same had not been furnished to me, counsel had no objection in that regard. Having called for the said pleadings I found that the said defence had not been taken by the Applicant. That put the final lid on that matter.

**Re: Section 59 of the Indemnity Guarantee and Bailment Act**

[20] In regard to Section 59 of the Indemnity Guarantee and Bailment Act, being asked by me from learned counsel for the applicant whether he was urging the same for me to consider, the response on his part was in the negative.

[21] For the aforesaid reasons I am compelled to conclude that the criterion of the Appeal succeeding if time was extended to appeal could not have been sustained.

### **The Criterion of Prejudice**

[22] On the Respondents side there are the following factors that stand in their favour, viz:

- (i) The applicant delayed in prosecuting the appeal in the first instance;
- (ii) The applicant was in breach of the High Court judgment dated 17 November, 2015 which decreed costs in a sum of \$2,500.00 be paid which has not been paid to date – thus defying an inveterate principle of the law that, “first comply and then complain.”
- (iii) The Applicant through all the events of the litigation process had not given up vacant possession until 13 May 2016 and that too after the Respondents had to go through the process of executing the Writ of Possession the High Court had issued.
- (iv) Consequently, the Respondents had been deprived of peaceful enjoyment of possession from 31 October, 2006 till at least 13 May, 2016. (a period of over 9 years).

[23] I have looked at the Affidavit filed by the 2<sup>nd</sup> Respondent dated 29 April, 2016 in that regard, particularly what has been urged at paragraph 8 therein.

[24] Thus, on a balance, the prejudice criterion also stands tilted in favour of the Respondents.

[25] For the aforesaid reasons I do not think it necessary to waste time on the background facts relating to the litigation between the parties, a factor I referred to in paragraph 4(i) of this Ruling. If the conduct of parties which I consider to be a relevant factor (vide: paragraph 4(ii) above) is taken into account, the conduct of the Applicant as recapped in paragraph 20(i) to (iv) above also goes against him.

### **Conclusion**

[26] On the basis of what I have articulated above, I rule that, the present application seeking extension of time to have the Appeal of the Applicant entertained is not entitled to succeed.

[27] Accordingly, I proceed to make the following orders:-

1. The Application seeking extension of time to appeal is refused and/or dismissed.
2. The Applicant is ordered to pay as costs of this application a sum of \$1,500.00 to the Respondents within 28 days of this Ruling.



3. The said sum shall be in addition to the costs ordered against the Applicant by the High Court when it gave judgment against the Applicant by its judgment dated 17 November 2015, which sum shall also be paid by the applicant, along with the sum decreed in Order 2 above within 28 days of this Ruling.



A handwritten signature in blue ink, which appears to read "Almeida Guneratne".

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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**

**Solicitors:**

Babu Singh & Associates for Appellant  
Sherani & Company for Respondents