

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL ABU 70 of 2015
(High Court HBC 277 of 2010)

BETWEEN : SATYA NAND

Appellant

AND : RAJENDRA PRASAD

First Respondent

AND : JEREMAIA VUNISA

Second Respondent

Coram : Calanchini P

Counsel : Ms S Kunatuba for the Appellant
Mr S Singh for the Respondents

Date of Hearing : 16 December 2015

Date of Ruling : 15 April 2016

RULING

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

- [2] The jurisdiction to make such an order is given to the Court under 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 enlarge time may be exercised by a judge of the Court.
- [3] The application was made by summons filed on 28 September 2015 and was supported by an affidavit sworn on 28 September 2015 by Ulamila Fa-Tuituku. A supplementary affidavit in support was sworn on 5 November 2015 and filed on behalf of the Appellant. The application was not opposed by the Respondents. There was no answering material filed by the Respondents. The Appellant filed written submissions prior to the hearing.
- [4] The dispute between the parties arises out of an oral lease agreement in respect of premises situated at 2 Daya Street Vatuwaqa. The lease was for one of two shops located on the premises. The monthly rental was \$1200.00 and was paid up to 31 December 2009. The Appellant carried on his business in the front part of the shop and lived with his family in the rear of the shop. In October 2008 lease agreement was renewed. The Appellant claimed that the renewal was partly in writing and partly oral. It was to take effect from 1 January 2010. The rent would become \$2000.00 per month. The Appellant claimed that there was also an oral agreement that the increase in rent was in consideration for him leasing both shops. The Appellant paid the rent for some months in 2010. However, the second shop was not leased to him. The Appellant stopped paying rent and was evicted. The Appellant claimed, amongst other relief, damages for trespass and illegal distress. The Respondents claimed monetary relief for rent and outstanding utility accounts.
- [5] On the evidence before him the learned Judge found in favour of the Respondents. The Appellant's claim was dismissed. The Appellant was ordered to pay to the Respondents the sum of \$14,100.00 as outstanding rent and \$4,656.00 for electricity with interest.

- [6] In determining an application for an enlargement of time the Court has a discretion that must be exercised judicially. In NLTB (now TLTB) –v- Almed Khan and Another (CBV 2 of 2013; 15 March 2013) the Supreme Court discussed five factors and are usually considered to ensure that the discretion is exercised in a principled manner. These factors 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 or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced. These are matters that go to determining whether it would just in all the circumstances to grant or refuse the application.
- [7] In this case the judgment of the High Court was pronounced on 24 July 2015. The application for an enlargement of time was filed on 28 September 2015 and served on 5 October 2015. The time for appealing under Rule 16 of the Rules expired on 4 September 2015. The application is about 4 weeks out of time.
- [8] There is a brief explanation offered for the delay in the supporting affidavit. There are no particulars provided in respect of when the Appellant became aware of the judgment nor as to when the present practitioner on record was instructed to act and seek an enlargement of time. When a party is seeking to obtain the indulgence of the Court by way of the exercise of a discretion in that party’s favour it is a requirement that the facts relied upon should be fully disclosed. In its present form the explanation is unsatisfactory.
- [9] The grounds of appeal upon which the Appellant intends to rely in the event that an enlargement of time is grant are set out in annexure A to the supporting affidavit. They are:
- “1. That the learned trial judge erred in fact and law when he decided that the rental of \$2000 per month was only for shop No 2.
 2. That the trial judge erred in fact and law when he accepted the 1st Defendant’s version of the increase in rental of shop No 2 without any written application by the 1st Defendant to the Office of the Fair Rents Officer.

3. *That the trial judge erred in fact and law when he did not consider that one cannot increase the rental of the premises being rented for more than 2.25% after 31st December 1985.*
4. *That the trial judge erred in law when he did not take into account that provisions in the written Agreement were in breach of existing law on the matter.*
5. *That the trial judge erred in fact and law when he did not consider claim of damages in respect of forceful and illegal closure of Shop No.2 for 7 days."*

[10] Grounds one and two relate to findings of fact and weight of evidence, both of which are rarely disturbed on appeal. Ground three raises an issue concerning an increase in rent contrary to legislation. Ground four is not sufficiently particularised. Ground five ignores the fact that the learned Judge had concluded that the Appellant had failed on the issue of liability. In my judgment ground three raises an issue of sufficient significance to allow the appeal to proceed before the Court of Appeal.

[11] By indicating that they do not oppose the application the Respondents can be assumed to be indicating that they will not be unfairly prejudiced in the event that an enlargement of time is granted.

[12] As a result the application is granted on condition that the Appellant pay to the Respondents the sum of \$1,800.00 costs within 21 days from the date of the judgment.

Order:

1. *Application is granted.*
2. *The Appellant is to file and serve a notice of appeal within 21 days from the date of this judgment and thereafter the appeal is to proceed in accordance with Rules 17 and 18 of the Rules.*
3. *The Appellant is to pay to the Respondents the sum of \$1,800.00 as costs within 21 days from the date of this judgment.*

4. *In default of either Order 2 or Order 3 above the appeal is deemed to have been abandoned with immediate effect.*



M. Calanchini

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL