

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

CIVIL APPEAL NO. ABU 0012 of 2016
(ILSC No. 029/2013)

BETWEEN : **THE CHIEF REGISTRAR** *Appellant*

AND : **DEVANESH PRAKASH SHARMA** *1st Respondent*

AND : **R PATEL LAWYERS** *2nd Respondent*

Before : Almeida Guneratne, JA

Counsel : Mr. A. Chand for the Appellant
Mr. P. Sharma for the Respondents

Date of Hearing : 1st June, 2016

Date of Ruling : 14th June, 2016

RULING

The Application

[1] By Notice of Motion dated 17 February 2016 the Appellant – Applicant (hereinafter referred to as the Appellant) has sought enlargement of time to appeal against the Judgment (Ruling) of the Independent Legal Services Commission (hereinafter

referred to as the Commission) dated 12th November 2014. The two main orders sought are:

- 1) That enlargement of time to file the Appellant's Notice of Appeal be granted and,
- 2) The Notice and Grounds filed on 22nd December, 2014 be re-instated.

[2] Those orders have been sought

"Upon grounds contained in the Affidavit in support of the Notice of Motion for Enlargement of Time and Leave to Appeal out of Time, of Kelevi Veidovi's sworn affidavit on the 16th Day of February 2016. This Application is made pursuant to Section 20(1) of the Court of Appeal Act (Cap.12) and Rules 16 and 27 of the Court of Appeal Rules."

Some Preliminary Matters

Re: Order 2 of the Notice of Motion

[3] The Notice and Grounds filed on 22nd December, 2014 against the Commission's ruling dated 12th November 2014 were struck out by a ruling of a single Judge of this Court (ABU 086/2014) as per Calanchini, P.) on 27th January 2016 for the reasons set out in that ruling. Consequently, the dust settled on that matter, quite apart from the fact that, I, as a single Judge of this Court have no Jurisdiction to "Re-instate" an appeal that has been struck out. It would therefore appear that the Order 2 that has been sought in the Notice of Motion is misconceived.

Re: Seeking "Leave to Appeal"

[4] Having regard to the words "any order" in Section 128(1) of the Legal Practitioners Decree 2009 (PD) there is no requirement to seek "leave to appeal". On that point,

Calanchini, P in ABU 86/2014 “found in favour of the Appellant (Applicant)” (at paragraph 16 of His Lordship’s Ruling on that matter.

- [5] Consequently, the matter for determination by me in this application reduces itself to the question of enlargement of time to appeal.

Criteria for Enlargement of Time to Appeal

- [6] The Fijian judicial annals bristle with precedents on this matter and indeed it is well settled law. Suffice it to refer to the Supreme Court decision in **NLTB v Khan & Another** [CBV 002 of 2013, 15 March 2013] which has been consistently followed.

- [7] The well entrenched principles are:-

1. The length of the delay
2. The Reasons for the delay
3. Prejudice or otherwise to the parties
4. The Merits of the Appeal and/or Prospect of success in Appeal.

Brief Background History to the Present Application

- [8] At this point it may be appropriate to give a brief account of the history to the present application.

- [9] The Appellant initiated disciplinary proceedings in the Independent Legal Services Commission (ILSC) against the 1st Respondent (a legal practitioner) and the 2nd Respondent (1st Respondent’s legal firm) under the provisions of the Legal Practitioners Decree, 2009. There were ten counts – six for unsatisfactory conduct in

terms of Section 81 of the Decree and four in pursuance of Section 82(1)(a) and 82(1)(b) thereof.

- [10] The Learned Commissioner having entertained an application to make an interlocutory ruling, after inquiry stayed the proceedings (what may be termed as an absolute or final stay) and had the charges struck out.
- [11] The Appellant appealed against the said order of the Commissioner within 40 days (which would have been within time if it were to be considered as an appeal under Rule 16 (b) but out of time if it were to be regarded as an appeal that fell under Rule 16(a).
- [12] The matter having come up before a single Judge of this Court, the Appeal was struck out on the Application of the Respondents. (Vide :ABU 86/2014 referred to earlier) on the basis that it was out of time. Hence what had occasioned the present application for extension of time.

Length and Reasons for the Delay – Necessarily Interconnected

- [13] These two criteria are necessarily connected. Reasons have to be adduced only if there was a delay. Then again, there will almost always be some reason given for the delay. To say a certain period of delay is substantial or not is to go on “arithmetical delay” as opposed to “culpable delay”. The mere length of the delay cannot be taken in isolation. It has to be with reference to the reasons given for the delay.
- [14] Applying these inter-connected criteria to the facts of the instant case, the delay *per se* has to be counted as 549 days or so (that is, between the date of the ruling of the ‘Commission’ being 12 November, 2014 and the date of the Notice of Motion in the

present application being dated 17 February 2016) The reason given is the chequered fate that had befallen the Appellant on account of the Appellant's misunderstanding and/or interpretation of the correct time limits within which he was required to appeal against the Commissioner's ruling. That apparent doubt had been clarified (vide: paragraph [15] of the Appellant's written submissions of 27 April, 2016), only after this Court's ruling in ABU 0086/2014 referred to earlier.

Can Such a misunderstanding and / or Interpretation be excused?

[15] I have held in some single judge rulings of this court that, although a layman's mistake could perhaps be excused in certain circumstances a lawyer's mistake ought not to be excused. (vide: **Gregory Clark v Zip Fiji**; ABU 0003/2014 and **Ghim Li Fashions (Fiji) Ltd v Ba Town Council**; ABU 0003/2012, both decided on 5th December, 2014). Stated as a general proposition I am of the view that the same should apply to the Appellant (as the Chief Registrar) as well.

[16] But, those cases were concerned with mistakes in regard to time limits to file applications flowing from a misunderstanding and/or ignorance of the relevant Judicial calendar. In contrast, the lapse in the instant case on the part of the Appellant stands on a different footing. When he went before a single Judge in ABU 0086/14 (supra) within 40 days he had been under the impression that, the learned Commissioner's Ruling was 'final' (and not interlocutory) It is to be borne in mind that, when the learned Commissioner issued a stay order and struck out the proceedings, it had a 'final' effect on the proceedings the Appellant had initiated. This was the genesis of the Appellant's misunderstanding and/or interpretation. This stood clarified only by the Ruling in ABU 0086/14 (supra) when His Lordship Calanchini, P took the view that, the Commissioner's ruling was 'interlocutory' (and not 'final') on the basis of the "Application test" (as opposed to the 'Order Test').

- [17] A list of examples of “interlocutory orders” were given in **Goundar v. Minister of Health**; [2008] FJCA 40 at page 46. It is after the Ruling in ABU 0086/14, that Rulings/Orders made by the Commissioner under the Legal Practitioners Decree of 2009 came to be added to that list.
- [18] The question however is, ought the Appellant be excused for the wrong interpretation be had gone on in regard to the nature of the Commissioner’s ruling?
- [19] In **NLTB v Rajesh Kumar & Shiu Prasad** [2005] ABU 54/2004, 13 April, 2005, it was said that, ignorance of counsel of the Practice Direction of 1/04 is “rarely sufficient” to excuse delay.
- [20] That decision implies that there could yet be room for “sufficient reasons” to excuse delay.
- [21] Then, there is the single Judge decision in **Vunimoli Sawmill Limited et al v Amrit Sen et al**, ABU 028/2013 (as per Calancini, P) where His Lordship referred to the English case of **Gatti v Shoosmith [1939]** 3 ALLER 916 in which dicta appear that are suggestive of circumstances that may excuse lawyers’ lapses.
- [22] In the case of **Vimal Construction and Joinery Works Ltd and another v Vinod Patel & Co Ltd.** (ABU 93 of 2006) which Calancini, P in His Lordship’s aforesaid Ruling (ABU 028/2013) had referred to (vide paragraph [14] of the said Ruling), wherein reference was made to:-

“A contention as to incompetence of legal advisors will rarely be sufficient and where it is evidence in the nature of judgment or serious incompetence... is required”

[23] Finally, I considered another single Judge decision in **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** (HBC 190 of 2009, decided on 3 February, 2010) wherein His Lordship Justice Priyantha Fernando had allowed an application for enlargement of time adopting the rationale in **Winstanley v. Winstanley** (1998) EWCA CIV 807 where it had been said that:-

“An extension of time can be granted in appropriate circumstances (the emphasis is mine) eventhough the failure in time was due to a mistake on the part of a legal adviser”

[24] A survey of the aforesaid precedents clearly show that a lawyer’s lapse could be excused in a number of situations :

- a) For “sufficient reasons”,
- b) Circumstances contemplated in the precedents I have recounted at paragraph [21] above,
- c) Incompetence *per se* as opposed to “flagrant or serious incompetence”

[25] I have earlier expressed the view (at paragraph [15] above in this ruling) that lawyers lapses must equally apply to the Chief Registrar, but excuses granted to lawyers must also equally apply to the Chief Registrar as well.

Application of the said *cursus curiae* to the instant Case

[26] Applying the said *cursus curiae* to the instant case I am inclined to hold the view that the Chief Registrar’s (Appellant’s) excuse for the delay does not flow from:-

- i. Any misreading of practice directions as to compliance with time limits;
- ii. Any incompetence ... or any “flagrant or serious incompetence”

[27] Rather, it was on account of what I have recounted at paragraph [16] above in this Ruling and I take the view that, the reason contained therein falls within the phrases “sufficient reasons” and/or “appropriate circumstances”.

[28] Accordingly, I accept the reasons given for the delay in as much as it cannot be said that, there was “culpable delay” on the Appellant’s part.

Prejudice or Otherwise to the Parties

[29] The following factors weighed with me in that regard:-

- (i) The complainant’s concern which had prompted the Appellant to initiate proceedings before the Commission (ILSC).
- (ii) The Appellant’s role as a statutory functionary to ensure proper professional standards are observed in the “public interest”.
- (iii) As against (i) and (ii) above, the Respondents interest in absolving themselves in regard to the allegations made against them.

The Link between the Prejudice Criterion and the Merits of the Appeal and/or Prospect of Success in Appeal

[30] I pause here in saying that, I would have been inclined to grant the application for extension of time on the sole ground of the reasons adduced for the delay. But, given the fact that our courts have proceeded otherwise, while leaving the “prejudice criterion” in abeyance for the time-being, I move onto the criterion .re: the merits of the Appeal and/or prospects of success in Appeal, which strikes me as the decisive criterion for the granting of an application for leave to appeal, notwithstanding the lapse of time, having surveyed past precedents.

- [31] The learned Commissioner in his impugned Ruling opined that,
- a) There was no “malice or vindictiveness” on the part of the Appellant in having initiated proceedings before him, although
 - b) He arrived at as a finding of fact that, there had been “abuse of process” by the Appellant. The reasons he gave in his Ruling are found at paragraphs [41] to [61] thereof.

My Reflections Thereon

- [32] Those are serious strictures passed on the Appellant in regard to which he has been denied an opportunity to counter in as much as the Commissioner granted a final [absolute] stay and struck off the proceedings.

- [33] Mr. Chand, appearing for the Appellant was heard to submit that, that was the prejudice that had resulted in the appellant’s cause, while stating in the same breath on a query raised by me, that, the lament on the part of the Respondents that, no opportunity had been given to the Respondents to counter the statements made by “the complainant”, was on account of a practice that had grown ever since the promulgation of the LPD in 2009” which I find difficult to accept.

How then, in the aforesaid conspectus of Issues, a single Judge of the Court of Appeal to approach the matter of granting or refusing an application to appeal notwithstanding the lapse of time?

- [34] This is a question I posed for myself to answer and I proceed to answer the same as follows:

It is not for a single Judge to determine on the merits of the appeal. His task is to see whether there are arguable points to be gone into before the full Court, for, if a single Judge was to go into the merits in full scale, he would be usurping the jurisdiction of the full court. Needless to say, that is an

approach adapted by the Court of Appeal, well entrenched in our Judicial jurisprudence as reflected in past precedents for which reason I shall not crowd this Ruling by referring to them save as to refer to a long line of decisions for the purpose of easy elucidation reflected in Reddy's Enterprise Ltd v. The Governor of the Reserve Bank of Fiji; [1991] FJCA 4; The Habib Bank Case (supra) and; the Herbert Construction case (supra).

Are there then Arguable Points to grant leave on the criterion of merits and /or prospects of success in Appeal?

[35] In answer to that question the following struck me as being arguable points – viz:

- (i) should “a practice” in ignoring the entreats (to use a term employed by the learned Commissioner) made by legal practitioners when charged under the LPD be ignored by the Chief Registrar in instituting proceedings before the ILPC? Would that amount to procedural unfairness?”
- (ii) whatever view that may be taken on that question, would it amount “procedural unfairness” given the fact that the learned Commissioner himself found that there was “no malice or vindictiveness” in regard to the Appellant’s conduct?
- (iii) where should the line be drawn between acts done “without malice or vindictiveness” and acts amounting to “abuse of process?”.
- (iv) How are those questions to be answered in relation to the criterion of prejudice to the parties concerned? (why earlier, I left the said aspect in abeyance for, it is so closely inter-linked with the merits and/or prospects of success in Appeal.

Re: Grounds of Appeal

[36] As many as 28 grounds of appeal have been urged in effect in the Notice of Appeal. Twenty seven have been given specific numbers followed by paragraph 28 thereof which strikes me as a conclusion based on the said antecedent 27 grounds. The said grounds and what has been averred in paragraph 28 are subsumed in the matters I have raised at paragraph [35] in this Ruling.

Matters for the Full Court

[37] For the aforesaid reasons I am of the view that, the aforesaid issues I have put down must be left to the full court to determine as being arguable points taken together with the several grounds urged in the Notice of Appeal and what has been averred at paragraph [28] thereof.

Should I make an order for Costs?

[38] I think not. I say this for the reason that, the matter involves legal practitioners' rights as against the Chief Registrar's role under the LPD, which to my mind, is a serious and/or intricate matter the full Court must go into.

Conclusion

[39] For the aforesaid reasons, I make order granting the Appellant's application for extension of time to entertain his appeal.

Orders in this Ruling:

1. *The application for enlargement of time to appeal against the Ruling of the Commissioner dated 12th December, 2014 is allowed.*
2. *There shall be no costs having regard to the circumstances of the matter.*



A handwritten signature in blue ink, reading "Almeida Guneratne", is written over a horizontal line.

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL