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

CIVIL APPEAL NO. ABU 142 OF 2018
(High Court HBC 347 of 2010)

BETWEEN	:	**KESTER YEE**	*Appellant*
AND	:	**THE COMMISSIONER OF POLICE**	*First Respondent*
	:	**THE ATTORNEY-GENERAL**	*Second Respondent*

Coram	:	**Calanchini P**
Counsel	:	**Mr D Toganivalu for the Appellant** **Ms S Ali with Ms N Ali for the Respondents**
Date of Hearing	:	**17 June 2019**
Date of Ruling	:	**12 July 2019**

RULING

[1] This is an application for an enlargement of time within which a notice of appeal against the final judgment of the High Court may be given. The judgment was pronounced on 28 September 2018 whereby the Court dismissed the appellant's claim for damages for breach of constitution rights. The appellant was ordered to pay costs fixed in the sum of $3,000.00 within 21 days of the date of the judgment.

[2] This application is made by summons dated 6 December 2018 and filed on the same day. The application was supported by an affidavit sworn on 5 December 2018 by Kester Yee. The documents were served on the respondents on 12 and 14 December respectively. The application was opposed by the respondents on whose behalf an answering affidavit sworn on 21 December 2018 by Ajay Singh was filed. The parties filed written submissions prior to the hearing.

[3] The application comes before me pursuant to jurisdiction give to the Court under section 13 of the Court of Appeal Act 1949 (the Act) and Rule 27 of the Court of Appeal Rules (the Rules). Pursuant to section 20(1) of the Act a judge of the Court may grant an enlargement of time.

[4] The background facts may be stated briefly. Mr Kester Yee (the appellant) owns a business located at Shop 5, Metropole Building in Scott Street Suva. On 12 March 2005 members of the Fiji Police Force conducted a raid at the Metropole Building and entered the appellant's premises. The raid was pursuant to a search warrant for illegal gaming activities. The premises were searched and the appellant along with others present were taken into custody and conveyed to the Nabua Police Station. The appellant was interviewed under caution at the Central Police Station (Totogo Police Station) at 12.36pm 13 March 2005. The claim subsequently made by writ was for damages for malicious prosecution and for alleged breach of constitutional rights. The learned trial Judge accepted that the issues before the Court were (1) whether the search was lawful, (2) whether the appellant was subjected to humiliating and degrading treatment by being ordered to strip naked and while holding his ears squat down and then stand up again and (3) whether the actions of the Police were contrary to the Bill of Rights provisions of the 1997 Constitution.

[5] The learned Judge concluded that the search carried out by the Police was reasonable and that the appellant had failed to provide particulars as to the unlawfulness of the warrant. The Judge rejected the appellant's evidence of degrading and humiliating treatment. The Judge found that the appellant had also failed in his claim for malicious prosecution since

the elements were not particularized in the statement of claim. Although not expressly referred to by the Judge, the writ was not filed until 20 December 2010 in respect of a cause of action that arose between 12 and 14 March 2005. This delay is surprising considering that there was no claim for physical injuries and that part of the claim was in respect of "*constitutional redress*," proceedings that are usually required to be commenced in a timely manner.

[6] The factors to be considered for an enlargement of time are (1) the length of the delay, (2) the reasons for the failure to comply, (3) 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 (4) if time is enlarged will the respondent be unfairly prejudiced: **NLTB –v- Khan** [2013] FJSC 1; CBV 2 of 2013, 15 March 2013.

[7] The final judgment was pronounced on 28 September 2018. The notice of appeal was required to be served no later than 9 November pursuant to Rule 16 of the Rules. However the summons and the affidavit were not served on the respondents until 14 December. This represents a delay of 35 days. The delay is substantial and requires an explanation.

[8] The reasons for non-compliance with the Rules are set out in the supporting affidavit. In effect the reasons are the old age of the appellant and the need to find the funds to pay the fees required before work on the appeal could commence. Although he stated at the trial that he was 75 years old there is no medical evidence as to any disability in the affidavit and nor are there any particulars of the appellant's attempts to obtain the money requested by his legal representatives. The reasons are wholly unsatisfactory and do not provide a convincing reason for excusing non-compliance.

[9] As a result it is necessary to determine whether there is a ground that is likely to succeed in the event that an enlargement of time is granted. There is a draft notice of appeal annexed to the affidavit in support listing the grounds of appeal upon which the appellant relies in the event that the application is successful as:

"1. *The learned Judge erred in law and in fact in dismissing the plaintiff's respective claim that the search warrant and search conducted by the Fiji Police Force was unlawful.*

2. *The learned Judge erred in law and in fact in dismissing the plaintiff's claim that he was subjected to torture and degrading treatment and refused to award damages to the appellant.*

3. *The learned Judge misdirected himself on the facts of the case and therefore dismissed the claim in error."*

[10] During the course of his submissions Counsel for the appellant indicated that the principle ground of appeal related to the search warrant and the search. It would appear that the issue arises as a result of a wrong shop number appearing on the warrant, although the Police knew the shop premises they intended to search as there had been surveillance for some time. The search related to illegal gaming activities. The warrant specified shop No.1 when it would appear that the shop searched was No.5. On arrival at the Metropole building the police had handed the warrant to the appellant's agent and proceeded upstairs to the shop in question. It must be recalled that it was not the wrong premises that were searched rather it was the wrong shop number on the warrant. It was submitted that the confusion arose as a result of the layout of the shop premises at the Metropole building. The evidence at the trial was that it was necessary to reach shop 5 by entering shop 1. In my view, in this case the appellant's assertion that the Judge erred in holding that the warrant was valid and that the search was reasonable lacks merit. There is no basis for attacking the validity of the warrant issued under section 98 of the Criminal Procedure Act 2009. The confusion over the number of the shop and the fact that the wrong shop number was stated in the warrant does not, in this case, invalidate the warrant nor render the search illegal. The police were aware of the location of the shop that was to be the subject of the search.

[11] The search itself was conducted at the shop that had been under surveillance. Although that shop was shop number 5, it was accessed through shop number 1. In my view it would be unreasonable to insist that the wrong number on the warrant rendered the search

invalid. Such a strict approach to warrants and searches would unreasonably impede police investigations. This is a case of a minor technical error in a search warrant which was otherwise of no consequence.

[12] Furthermore, the basis for pleading this allegation in the statement of claim is difficult to understand. There was no claim in trespass and nor was there any need to have evidence excluded in the trial. The claim was essentially one for damages for humiliating and degrading treatment.

[13] On ground 2 it is clear that the learned Judge rejected the appellant's evidence relating to the alleged humiliating and degrading treatment by the Police personnel. The appellant has not put forward any reason why this Court should interfere with his findings or the conclusions of the trial Judge that the allegations were unfounded.

[14] The third ground is not sufficiently particularized for the purpose of this application.

[15] For the reasons stated above the appeal is unlikely to succeed and as a result the appellant has failed to establish the basis upon which an enlargement of time might be granted. The application is refused. The respondents are entitled to costs fixed at $2,000.00 to be paid within 28 days of the date of this Ruling.

Orders:

1). *Application for enlargement of time is refused.*

2). *Appellant to pay costs to the respondent fixed at $2,000.00 within 28 days of the date of this Ruling.*

W. Calanchini

Hon Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL