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

CIVIL APPEAL NO. ABU 33 of 2024
[In the High Court at Suva Case No. HBC 83 of 2019]

BETWEEN	:	**RATU ISOA TIKOCA**
		Appellant
AND	:	**AIYAZ SAYED-KHAIYUM**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Naivalu for the Appellant** **Mr. D. Sharma for the Respondent**
Date of Hearing	:	**04 December 2024**
Date of Ruling	:	**11 December 2024**

RULING

[1] The respondent initiated a writ of summons together with a statement of claim on 21 March 2019 alleging 'libel and slander' on the part of the appellant and claiming damages together with punitive, exemplary and aggravated damages together with other relief. The registered bailiff, Nilesh Kumar had purportedly served the defendant at Lot 3, Oneata Place, Samabula by leaving the document on the doorstep of Lot 3 Oneata Place, Samabula in the presence of the appellant and had taken a picture of the documents left on the doorsteps annexed to his affidavit. The interlocutory judgment was filed on 5 November 2019 and sealed on 7 November 2019 (default judgment) respectively. A judgment on assessment of damages was delivered on 25 February 2021[1]. The interlocutory judgment together with

[1] **Sayed-Khaiyum v Tikoca** [2021] FJHC 119; HBC83.2019 (25 February 2021)

summons for assessment of damages, affidavit in support and a letter were served onto the appellant, by leaving the documents at his residence at Lot 3 Oneata Place, Samabula, and a picture taken and annexed with the affidavit therein. The appellant then filed a summons on 1 April 2021 seeking to have the default judgment against the appellant set aside in terms of Order 2 Rule 1(1) and (2), Order 2 Rule 2(1), Order 3 Rule 4, Order 13 Rule 10, and Order 19 Rule 9 of the High Court Rules 1988 and its inherent jurisdiction. The High Court dismissed the appellant's application to set aside the said default judgment on 04 August 2022[2]. On 18 August 2022 the appellant's solicitors filed a summons for leave to appeal against the decision on 04 August 2022 and stay of execution of the default judgment. The High Court dismissed the summons on leave to appeal and stay of execution (18 August 2022) on 13 February 2024[3].

[2] The appellant through its solicitors Law Naivalu had filed summons in the Court of Appeal on 26 March 2024 seeking *inter alia* that he be granted extension of time to seek leave to appeal against the decision of the High Court dated 13 February 2024. The supporting affidavit of Peceli Heritage (filed on the authority of the appellant) makes it clear that the appellant seeks to renew the same leave to appeal application dismissed by the High Court, before the Court of Appeal.

[3] In terms of paragraph 1 of Practice Direction No. 3 of 2018 any renewed application for leave to appeal or enlargement of time made to the Court of Appeal pursuant to Rule 26(3) of the Court of Appeal Rules in a civil appeal should be filed and served within 14 days of the date of pronouncement of the decision of the High Court refusing the application and as per paragraph 3 of Practice Direction No. 4 of 2019 in default thereof, the appeal will be dismissed for want of prosecution with immediate effect. Therefore, the time requirement for filing and serving any renewed application for leave to appeal or enlargement of time is 14 days and not 06 weeks as contended by the respondent or 21 days as argued by the appellant. Rule 16 of the Court of Appeal Rules only applies to notice of motion/notice of

[2] **Sayed-Khaiyum v Tikoca** [2022] FJHC 462; HBC83.2019 (4 August 2022)
[3] **Sayed-Khaiyum v Tikoca** [2024] FJHC 85; HBC83.2019 (13 February 2024)

appeal (in case of a final judgment or decision – section 12(1) of the Court of Appeal Act) or an application for leave to appeal (in the case of interlocutory orders or interlocutory judgments – section 12(2)(f) of the Court of Appeal Act).

[4] Therefore, since the appellant had not filed the renewed application for leave to appeal within 14 days (according to the appellant the delay is 21 days), the appeal will have to be dismissed for want of prosecution with immediate effect. However, the current application is for enlargement of time to file a renewed application for leave to appeal against the refusal by the High Court and the question arises whether same consequence will follow in that situation as well. Although, no Practice Direction permits an appellant to seek extension of time to file a renewed application for leave to appeal outside the 14 day-period, Rule 26(1) of the Court of Appeal Rules read with Order 3 Rule 4 (O.3, r.4) of the High Court Rules and even otherwise, quite independent of those Rules, section 20(1)(b) of the Court of Appeal Act confer jurisdiction on a single Judge of the Court of Appeal to extend the time within which an application for leave to appeal may be lodged. There is no reason why this provision should not apply to a renewed application for leave to appeal arising from a dismissal of summons for leave to appeal against and stay of proceedings of a default judgment by the High Court. It is also beyond doubt that the impugned decision is an interlocutory order/judgment and not a final judgment/decision [see **Gounder v Minister of Health** [2008] FJCA 40; ABU0075 of 2006S (09 July 2008)]

Law on enlargement of time

[5] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time[4]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is

[4] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[5] Nevertheless, these matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application[6]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[7]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[8].

[6] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[9]

[7] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[10] In this case the renewed application for leave to appeal should have been filed by 26 February 2024 but eventually filed on 26 March 2024. Thus, the length of the delay is 04 weeks which is substantial. 40 days have been considered 'a significant period of

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[5] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

[6] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

[7] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

[8] Per Marsack, J.A. in **Latchmi v Moti** (supra)

[9] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

[10] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

delay'[11]. Delay of 11 days[12] and 47 days[13] also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation[14]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[15]

[8] Rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.[16]

[9] As for the reason for the delay Mr. Haritage claims in his affidavit dated 26 March 2024 that the reason for late filing of the extension of time application on 26 March 2024 was that internet was down from midday of the previous day and they could not send papers to the city agents to be filed on 25 March 2024. This issue on the internet was allegedly due to the data on the residential plan being exhausted and it was the package Mr. Naivalu used from the time he reverted to private practice (from when is not disclosed) and he had not upgraded his data plan to a small business plan.

[10] The problem with this explanation is that Mr. Naivalu was the appellant's counsel when the impugned decision was delivered on 13 February 2024 and there is no explanation as to why he waited until 25 March 2025 to settle and file the extension of time application. In any event, the time for filing the renewed application for leave to appeal was over by 26 February 2024. Either the appellant's counsel was ignorant of Practice Directions No. 03

[11] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)
[12] **Avery v Public Service Appeal Board** (supra)
[13] **Latchmi v Moti** (supra)
[14] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported
[15] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)
[16] **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

of 2018 and 04 of 2019 or negligent in not complying with them or simply ignored them. Neither is excusable.

[11] The appellant too does not say in an affidavit as to when he instructed Mr. Naivalu to file a renewed application and Mr. Naivalu or Mr. Haritage also does not say as to when the firm received instructions from the appellant to do so. There is no material before this court to determine whether the delay is attributable to the appellant or Mr. Naivalu. Therefore, I do not have get involved in the debate as to whether the lapse on the part of lawyers must visit a party litigant[17] or whether a party litigants should not be punished for the lapse on the part of their lawyers[18]. Perhaps, the approach taken by Lord Green, M.R. at p.919 in **Gatti v Shoosmith** [1939] 3 All ER 916 on the failure to lodge a timely appeal due to a mistake by a solicitor seems more practical and sensible compared to any hard and fast rule.

> *'the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts…… What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.'*

[12] Therefore, all in all I am not persuaded by the explanation or the reasons for the delay.

[13] Even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if extension is to be granted, then the application must be rejected; even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless the reason for the delay

[17] See Dr. Almeida Guneratne's comments as single Judge in **Fiji Industries Ltd v National Union of Factory and Commercial Workers**
[18] **Hussain v Prasad** [2022] FJSC 7; CBV 15 of 2020 (03 March 2022)

in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers[19]. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said[20] that the effect of propositions (i) and (ii) subject to proposition (iii) is to make the merits of the appeal the paramount, indeed the decisive, consideration and that goes too far because there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused. The Supreme Court added that the bottom line is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected. As for the proposition (iii), the Supreme Court said mistakes made by lawyers is not an exceptional category for this purpose and the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive.

[14] However, Dr. Almeida Guneratne, P took a different view later and said[21] that if the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case***) are explained to

[19] Per Dr. Almeida Guneratne, J.A. in **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014) & **Gregory Clark v Zip Fiji** [2014] FJCA 189; ABU0003.2014 (5 December 2014)

[20] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

[21] **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

the satisfaction of Court, then the matter should be left to the full Court to determine the appeal on the merits because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court's discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied. If the threshold criteria as envisaged in (a) and (b) above are not met by an applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** in as much as the above reasons would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[15] However, because Dr. Almeida Guneratne, P has not taken into account the views of the full court judgment of the Supreme Court in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** in his second ruling in ***Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary*** and also because I am bound by the Supreme Court decision, I am inclined to follow the Supreme Court decision in accordance with section 98(6) of the Constitution of Fiji incorporating the doctrine of *stare decisis*.

[16] The totality of the appellant's explanation for the delay viewed in the context the respondent's challenge to its reasonability, I am of the view that it does not meet the necessary threshold to satisfy the requirement for reasons for the delay.

[17] However, I am still required to consider the prospect of his appeal before the Full Court, for interest of justice demands that I take a holistic approach[22] by considering all the factors set out in ***Native Land Trust Board v Khan*** (supra) in addition to any other relevant factors before exercising my discretion either to grant enlargement of time or not.

[22] **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

[18] On that score, the appellant's counsel submits two matters for consideration on merits. Firstly, that there no proper service of summons was done (personal service) and secondly, the iTaukei version of the alleged defamatory statement was not filed in court but only a translation in English was before the High Court (defective pleadings).

[19] The registered bailiff, Nilesh Kumar had filed an affidavit in Court on 19 June 2019, wherein he stated that he had personally served the appellant at Lot 3, Oneata Place, Samabula on 16 May 2019 and since the appellant had failed to acknowledge service of the documents, the registered bailiff had left the document on the doorstep of Lot 3 Oneata Place, Samabula in the presence of the appellant and took a picture of the documents left on the doorsteps annexed to his affidavit. The appellant submitted that *'placing the documents on the defendant's doorsteps'* is bad precedent by legal standards for good and proper service.

[20] The appellant had failed to file any acknowledgement of service and a statement of defence in terms of the High Court Rules 1988 and therefore, it resulted in the respondent successfully obtaining an interlocutory judgment on 7 November 2019 pursuant to Order 19 Rule 3 of the High Court Rules 1988 against the appellant.

[21] The High Court judge in its decision dated 02 August 2022 on the application to set aside the default judgment dealt with the first issue as follows.

> *'[43] It can be ascertained from the above Affidavit that the Defendant was present at the time the Bailiff went to serve the documents onto him. However, the Defendant refused to acknowledge the service of the documents. The Bailiff had no alternative but to leave the documents on the doorsteps in his presence. That is accordingly a proper service of the documents onto the Defendant in terms of the High Court Rules 1988.*
>
> *[44] The Defendant has deposed in his Affidavit in Support at paragraph 8 that he departed Nadi for Sydney on 16th October 2019.*
>
> *[45] He did not realize the fact that he only left for Sydney on 16th October 2019 only 5 months after being personally served with the Court documents on 16th May 2019.*

[46] Further, it was only after the Defendant was personally served that the Defendant instructed Vuetaki Law to act for him and write a public retraction and apology to the Plaintiff in a prominent print. This prompted Vuetaki Law to write a letter addressed to R. Patel Lawyers on Thursday 23rd May 2019. It will be noted that this letter was written just 7 days after the personal service of the Writ of Summons and the Statement of Claim. [Annexure 'A' within Affidavit of Aiyaz Sayed-Khaiyum refers].

[47] There is also clear evidence before Court that the Defendant was staying in Suva because his own Solicitors had admitted this fact in an e-mail on 16th June 2019 [Annexure B] in the Plaintiff's Affidavit refers.

[48] It has become obvious and clear that the Defendant was personally served with the Writ of Summons and the Statement of Claim on 16th May 2019 by the Registered Bailiff, Nilesh Kumar who has confirmed and has deposed an Affidavit of Service confirming the service on the Defendant of the Court documents filed in Court on 19th June 2019 accordingly.

[49] Since the Defendant was challenging the Personal Service of documents on the Defendant in terms of the Affidavit of Service filed by the Registered Bailiff, Nilesh Kumar, then the Defendant should have immediately filed a Summons and sought for an Order to 'Set Aside the Affidavit of Service'. However, this was not done and the evidence before Court confirms that personal service was effected onto the Defendant on 16th May 2019.

[22] If the appellant had deliberately refrained from acknowledging service of documents in the circumstances above said, I do not see any other alternative for the bailiff other than placing the document on his doorstep and taking a picture thereof. I have no reason to doubt the correctness of the position taken up by the High Court judge in this respect. I see little prospect of success on this ground in appeal.

[23] On the issue of lack of iTaukei version but only the English translation of the alleged defamatory sentiments, the High Court judge in the same decision had dealt with it as follows.

[55] The Defendant raised the issue of translation of the defamatory statement made in iTaukei language. He questioned why the iTaukei Statement was not put before the Court and for an expert to provide a translation?

[56] The Defendant also submitted that the translation made by Aklesh Vince Singh could not be accepted by Court as he is an Indo-Fijian.

[57] Above issues raised by the Defendant are triable issues.

[58] The Defendant after service of the Writ of Summons and the Statement of Claim failed in its bid to file and serve his Acknowledgement of Service and any Statement of Claim which subsequently resulted in the Plaintiff succeeding to obtain an Interlocutory Judgment by default of pleadings pursuant to Order 19 Rule 3 of the High Court Rules 1988 against the Defendant.

[59] At this stage of the proceedings, it must be borne in mind by the Defendant that the Interlocutory Judgment entered against him in absence of filing any Acknowledgement of Service and Statement of Defence simply means that the liability has been established against the Defendant.

[60] Further, if I may say at this stage that the Interlocutory Judgment in default of Acknowledgement and Statement of Defence tantamount to a regular Judgment entered in terms of Order 13 Rule 10 [O.13, r.10] of the High Court Rules 1988.

[61] To sum up, the issues raised herein in terms of the 'Translation' remains triable issues and cannot be raised in the Interlocutory application seeking for the setting aside judgment.

[62] It is the Defendant who failed to file an Acknowledgement of Service and the Statement of Defence if his contention was to contest the Plaintiff's claim therein.

[63] In absence of any Acknowledgement of Service and the Statement of Defence, the facts therein are deemed to have been established by the Plaintiff.

[64] Therefore, the issue of Translation of the original defamatory statement in iTaukei language and the tendering into Court of English translation made by Aklesh Singh has become too late in the day [some 17 months after the Entering of Interlocutory Judgment] on 7th November 2019. For the Defendant to challenge the issue when he had the opportunity to do so earlier after the personal service of the Plaintiff's Writ of Summons and the Statement of Claim.

[24] The counsel for the respondent submitted that the appellant's counsel raised this issue only in the submissions which means that there does not appear to have been any averments in the affidavit filed by him substantiating this complaint which was in any a trial issue as opposed to his position that he was not present when documents were served. Accordingly, I see little prospect for this complaint succeeding in appeal either.

[25] Just as Keith J in the Supreme Court said in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** there may be cases where the merits of the appeal may

not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard and I think this is not one such case. In my view, this appeal has little or no chance of success and the overall interests of justice does not demand that he be given extension of time to file a renewed application for leave to appeal.

[26] The respondent has submitted the prejudice that would be caused by the enlargement of time in the submissions as follows.

> *'[36] This matter has been dragging on since 2019. The Appellant has not honoured the judgment and neither has he paid any legal costs awarded so far. It seems that his only intention is to drag and delay this case as long as possible. The Respondent has incurred substantial legal costs and also had to live with the defamation to his character brought about by the Appellant's statements. If one looks at the overall delay caused by the Appellant then that period is substantial and inordinate. Even the period from 13th February 2024 to 26th March 2024 has not been adequately explained. There is no merit in this application.*

[27] In all the circumstances above discussed, taking an all-inclusive view of the relevant law and the material before me, I am not inclined to grant the appellant enlargement of time to file a renewed application for leave to appeal. Given that the length of the delay is substantial and the reasons for it are not at all convincing, I would cast the appellant in cost.

Orders of court:

(1) Enlargement of time to file a renewed application for leave to appeal is refused.

(2) Appellant to pay cost of $2000.00 to the respondent within 21 days of this Ruling.

COURT OF APPEAL FIJI

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL