

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

**CIVIL APPEAL NO. ABU 109 of 2024**  
**[In the Lautoka High Court Family Appeal No. 021 of 2023]**

**BETWEEN** : **ESTATE OF MAUNG MAUNG MON** with Ajay Kumar as  
Executor & Trustee.

***Appellant***

**AND** : **WIN SHEIN** of Ralulu Street, Tavua, Unemployed.

***Respondent***

**Coram** : **Prematilaka, RJA**

**Counsel** : **Mr. S. Luvena for the Appellant**  
**Mr. S. Nand and Mr. M. A. Hanifa for the Respondent**

**Date of Hearing** : **11 August 2025**

**Date of Ruling** : **25 August 2025**

**RULING**

[1] The respondent, Win Shein (wife) commenced proceedings for the distribution of the matrimonial property seeking 50% of them between the divorced spouses under section 162 of the Family Law Act 2003 (FLA) in the Magistrates Court in 2026. The husband Dr. Maung Maung Mon disagreed and the matter proceeded to court for a determination. However, while the matter progressing, Dr. Mon died in September 2020. As a result, the Estate of Dr. Mon and the appellant Mr. Ajay Kumar as Executor and Trustee of Dr. Mon's estate was substituted in his place. The hearing took place in March 2021 and the judgment

was delivered on 26 September 2023. The Magistrate *inter alia* ordered to divide the assets of the divorced couple and that Ms. Shein must receive 37% of the matrimonial property equivalent to FJD 303,770.00.

- [2] The appellant appealed to the Family High Court against the said judgment of the Magistrates court and the High Court delivered its judgment sitting in appeal on 09 December 2024 and dismissed the appeal.
- [3] The appellant has lodged a notice of appeal on 23 December 2024 containing several grounds of appeal against the HC judgment. Mr. Luvena for the respondent had pointed out at the security for costs (SFC) hearing on 18 February 2025 that leave to appeal was yet to be granted. Mr. Nand had replied that a stay was granted (by the High Court) and grounds of appeal were against decisions of the Magistrates court and the High Court. Accordingly, SFC inquiry had proceeded. The security for costs has been duly paid by the appellant. Thus, Mr. Luvena had put Mr. Nand on notice of the requirement of obtaining prior leave to appeal the High Court judgment.
- [4] The appellant has then filed summons for leave to appeal the High Court judgment on 27 February 2025. In the affidavit in opposition Ms. Shien has specifically stated that the appellant had filed the notice of appeal without first seeking leave as required by section 19(3) of the FLA whereas leave to appeal application should have been filed on or before 20 January 2025 and therefore the current leave to appeal application was out of time anyway. The appellant, Mr. Ajith Kumar in his affidavit in reply in an attempt to meet the above objection has stated that the counsel for Ms. Shien on 13 February 2025 knowing that there was an appeal in the Court of Appeal consented to the stay of the execution of the HC judgment (pending appeal) and further that his counsel had advised him that section 19(3) of the FLA does not stipulate any time frame as to when leave should be sought.
- [5] The appellant's submissions did not address this legal issue. The respondent's written submissions did extensively. The reply written submission of the appellant then addressed the matters raised by the appellant with regard to the maintainability of the appeal and even

the leave to appeal application. The counsel both parties spent a great deal of time in arguing this matter of law. Thus, I shall deal with it first, for my decision will have a direct bearing on the summons for leave to appeal and the notice of appeal.

[6] The respondent argues that (i) in terms of section 19(3) of the FLA leave of this court is necessarily required for an appeal against the decision of the High Court sitting in appeal on a matter decided by the Magistrates Court under the FLA and (ii) that the application for leave should be filed in terms of Rule 16 of the Court of Appeal Rules within 06 weeks (42 days) from the date on which the HC judgment was pronounced whereas the current leave to appeal application was filed after 38 days. The respondent has compared the filing of the notice of appeal on 23 December 2023 without leave to putting the proverbial cart before the horse and categorized it also as an abuse of process. The respondent therefore urges this court to strike out the summons for leave to appeal and dismiss the notice of appeal for want of leave and order costs on indemnity basis.

[7] The appellant does not contest the fact that leave was not obtained before filing the notice of appeal and that the leave to application was filed outside the 21 days. The appellant also does not challenge the fact that no application for enlargement of time to seek leave to appeal was filed. However, the appellant argues that section 19 (3) does not require that an appeal under that section must be lodged *with the leave of the Court of Appeal first had and obtained* because section 19 (3) simply states that appeals from Judges of the Family Division sitting on appeal from orders of the Magistrates Court lie to the Court of Appeal *with leave of the Court of Appeal*. The appellant further argues that the question of leave to appeal and the appeal from a judgment of the High Court could be conveniently heard together following the practice in the Supreme Court and relies on powers of this Court under section 17 of the Court of Appeal Act and Rule 22(4) of the Court of Appeal Rules in support of the contention that this court has a discretionary power to entertain an appeal subject to terms in order to determine the real question between the parties.

- [8] I think the appellant should not be surprised by the respondent's objection, not least because the respondent's counsel highlighted the same issue at the security for costs inquiry before the CR but because the Court of Appeal has already clarified<sup>1</sup> the need to seek leave before filing an appeal under section 19(3) of the FLA. In *Benn*, the Full Court considered an appeal from the High Court under section 19(3) of the FLA where the appellant had not filed an application for leave either in the High Court or the Court of Appeal. Before dismissing the appeal due to want of prior leave obtained, the Court advised the appellant to seek leave after withdrawing the notice of appeal and also seek extension of time to file an application for leave to appeal, if that be the case.
- [9] In a similar appeal in *Qalubau v Johnson*<sup>2</sup> no prior application had been made to this Court for leave to appeal and the Court asked counsel for the appellant to explain how it had jurisdiction to determine the appeal who candidly accepted that she had overlooked the need for leave. It was held that because section 19(3) of the FLA does not specify any time within which to make an application for leave, the more general provisions of the Court of Appeal Rules apply and that Rule 15(4) of the Court of Appeal Rules, read in conjunction with Rule 16, requires every application for leave to appeal to be filed and served within the stipulated period, calculated from the date on which the judgment of the Court below was pronounced. Eventually, the Court held that as prior leave had not been granted under section 19 (3) of the FLA, the appeal must be dismissed.
- [10] Section 21(1)(b) & (c) and section 21(2)(b) and (c) governing criminal appeals to the Court of Appeal have the same phrase 'with the leave of the Court of Appeal' and it has always been interpreted by the Court of Appeal and the Supreme Court in a long line of cases to mean that a notice of appeal or an appeal proper could be lodged only upon obtaining leave to appeal from a judge of the Court in terms of section 35(1)(a) of the Court of Appeal Act. Both section 20(1) and 35(1) use the same phrase 'A judge of the Court may exercise the following powers of the Court' but it has never been meant that therefore, without leave being granted by a judge of the Court, the Full Court straightforwardly exercise the

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<sup>1</sup> *Benn v Rafique* [2022] Family Appeal No. ABU 0026 of 2021 (22 June 2022)

<sup>2</sup> [2025] FJCA 110; ABU023.2024 (25 July 2025)

jurisdiction for leave to appeal and the appeal simultaneously as argued by the appellant. If not for any other reason, compliance with this procedure is essential to regulate the appellate procedure and efficient disposal of appeals in the Court of Appeal. At the leave to appeal (or extension of time to appeal) stage, a judge of this court would filter cases that should go before the Court for determination on the basis of principles applicable to leave to appeal (or extension of time) and whether there is discernible one or more questions of law as required by section 12 (1)(c) of the CA Act as far as appeals under section 19(3) of the FLA is concerned. It is also a very important eliminating mechanism to see that only the appeals with required merits reach the Full Court which obviously has constraints with regard to its resources and time for appeal hearings.

[11] In my view, this is not a fit case where the court should exercise discretion under section 17 of CA Act to entertain the appeal, for as far back as in *Benn* in 2022, this court had clearly laid down prior leave to appeal as a precedent condition for it to entertain an appeal under section 19(3) of the FLA which the appellant has ignored at his own peril. Rather, it is section 16 of the CA Act that should be applied to this appeal. Rule 22(4) has no relevance to the matter before me as the issue here does not relate to Rule 22(1) to (3). Neither, am I persuaded by the argument that the Court of Appeal should follow the practice of the Supreme Court as the statutory regimes applicable to the Court of Appeal and the Supreme Court are obviously different and what should be applied here is the Court of Appeal Act and CA Rules.

[12] In *Public Service Commission v Korovulavula*<sup>3</sup> Sir Moti Tikaram RJA held referring to Rule 16 of the CA Rules that where leave is required, filing and service of a notice of appeal will be irregular if done before the requisite leave is obtained. In *iTaukei Land Trust Board v Waqa*<sup>4</sup> the notice of appeal was filed on 13 December 2016, which was some twenty-five days after the time for appealing had expired. The Court said that legal practitioners should take note of the fact the Registry staff of Court of Appeal or for that

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<sup>3</sup> [1989] FJCA 24; Civil Appeal 11 of 1989 (23 June 1989)

<sup>4</sup> [2018] FJCA 117; ABU0138.2016 (13 July 2018)

matter of any Court are not qualified or tasked to give advice to them in respect to compliance with provision of legislation and/or rules. Despite the fact that the non-compliance with Rule 16(b) of CA Rules was only brought to the attention of Court at the time of the hearing of the appeal, the appeal was struck out for non-compliance with Rule 16(b) of CA Rules but did not order costs as no application was made to strike out the appeal for the said non-compliance.

[13] Thus, it is clear that the notice of appeal lodged by the appellant without leave being obtained cannot stand and should be struck out. Similarly, leave to appeal application filed well after the time allowed by Rule of 16(b) of CA Rules has expired also cannot be entertained. No extension has been sought to seek leave to appeal either.

[14] Now, I will come to the question as to what option is now available to the appellant in order to challenge the impugned HC judgment. The only avenue available to file summons for leave to appeal [after the lapse of 21 days against an interlocutory order – Rule 16(1)(a) or 06 weeks (42 days) for appealing against a final judgment – Rule 16(1)(b) as in the case of section 19(3) of FLA], is to seek enlargement of time for leave to appeal against an interlocutory order or a final judgment in terms of Rule 27 of CA Rules.

[15] The next question is which forum the appellant should go to and satisfy court based on recognized principles of law on enlargement of time<sup>5</sup>, if he so decides. The answer is that the appellant should first seek enlargement of time in the High Court as per Rule 27 read with Rule 26(3) of CA Rules failing which he may seek the same relief in a renewed application for enlargement of time in the Court of Appeal<sup>6</sup>.

[16] I am not inclined to order indemnity costs against the appellant, for the respondent has not satisfied me of the requirement to consider indemnity costs in this matter<sup>7</sup>.

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<sup>5</sup> See Fatiaki v Mobil Oil Australia Pty Ltd [2025] FJCA 52; ABU80.2024 (26 March 2025)

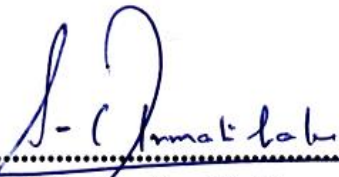
<sup>6</sup> See Lal v Jamnadas [2025] FJCA 67; ABU072.2024 (11 April 2025)

<sup>7</sup> See Griffiths v McGrath [2025] FJCA 45; ABU0063.2024 (24 March 2025)

**Orders of the Court:**

1. *Notice of Appeal filed 23 December 2024 is struck out.*
2. *Summons for leave to appeal filed on 27 February 2025 is struck out.*
3. *Appellant should file and serve summons for enlargement of time seeking leave to appeal within 21 days hereof, if he so desires.*
4. *Appellant is directed to pay costs of \$2500 to the respondent.*
5. *Appellant must comply with Order 4 on or before taking steps as per Order 3 and in any event within 21 days hereof whichever occurs first.*



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

**Solicitors:**

S Nand Lawyers for the Appellant  
Messrs Howell & Associates for the Respondent