

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

**CIVIL APPEAL NO. ABU 067 of 2024**  
**[In the Lautoka High Court Action No. HBC 140 of 2020]**

**BETWEEN** : **DEEPAK SHAIENDRA KUMAR** as the Administrator in the Estate of **SHYAM LAL** and in his personal capacity now residing at Cunningham, Stage 2, Suva, Driver.

**Appellant**

**AND** : **SATENDRA PRASAD** of Ellington, Fiji, Businessman.

**Respondent**

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

**Counsel** : **Mr. G. O' Driscoll the Appellant**  
**Mr. K. Singh for the Respondent**

**Date of Hearing** : **09 October 2025**

**Date of Ruling** : **23 October 2025**

**RULING**

[1] The respondent (original plaintiff) instituted proceedings in the High Court by way of writ of summons and a statement of claim seeking *inter alia* specific performance of the Sale and Purchase Agreement dated 20 March 2001 ('Agreement') between the appellant's (original defendant) father Shyam Lal and the respondent to purchase the land (Crown Lease) more fully described in the pleadings for \$23,000.00 ('purchase price').

- [2] The respondent stated that at all times material to the case, he fulfilled all of his obligations under the Agreement including the payment of the purchase price to Shyam Lal, which the appellant admitted. Shyam Lal had attended to all the formalities associated with the transfer of the land to the respondent including seeking the consent of the Director of Lands. However, before the land could be transferred to the respondent, Shyam Lal died on or about 18 November 2018 and the letters of administration was obtained by the appellant on 20 May 2019. Yet, the appellant failed and neglected to perform the Agreement entered into between Shyam Lal and the respondent and he also intended to sell the renewed State Lease to another person despite the respondent at all times was willing to complete the transfer of the subject matter.
- [3] The High Court delivered the judgment on 07 November 2022 ordering the appellant, being the Administrator of the Estate of Shyam Lal, to perform the obligations of the Agreement, to withdraw his objection to the consent of the Director of Lands for the transfer of the subject matter to the respondent and to lodge a fresh application for consent. The court also directed that if the appellant fails to have the subject matter of the Agreement transferred to the respondent, the respondent will be entitled to damages to be assessed with interest as prayed for.
- [4] The appellant's solicitors filed summons on 06 August 2024 supported by his affidavit seeking leave to appeal the High Court judgment out of time. Amended summons and affidavit were filed on 11 October 2024.

*Law on enlargement of time*

- [5] It is settled that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time<sup>1</sup>. 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

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<sup>1</sup> **State v Minister for Tourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

(ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration<sup>2</sup> (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?<sup>3</sup> 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<sup>4</sup>. 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<sup>5</sup>. 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<sup>6</sup>.

[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.<sup>7</sup>

[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

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<sup>2</sup> The test simply is 'whether the appellant has a realistic chance/prospect of success as opposed to fanciful or remote chance/prospect of success?' in order to decide the question "is there a ground of appeal that will probably succeed?" - See **Fatiaki v Mobil Oil Australia Pty Ltd** [2025] FJCA 52; ABU80.2024 (26 March 2025) at [11] – [16]

<sup>3</sup> **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.

<sup>4</sup> **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

<sup>5</sup> **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

<sup>6</sup> Per Marsack, J.A. in **Latchmi v Moti** (supra)

<sup>7</sup> **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

time.<sup>8</sup> In this case the application for leave to appeal out of time is late by about 08 days. This length of the delay is not substantial. 40 days have been considered ‘a significant period of delay’<sup>9</sup>. Delay of 11 days<sup>10</sup> and 47 days<sup>11</sup> also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation<sup>12</sup>. 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.<sup>13</sup>

[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.<sup>14</sup>

[9] The appellant admits that the time for a direct appeal was over by about 19 December 2022 and his enlargement of time to appeal application is late by 19 months i.e. 01 year 07 months. The delay itself is totally inexcusable.

[10] However, the appellant attempts to explain the delay by stating that he had assigned the task of filing the appeal to his previous solicitors and paid their fees. According to him, he checked with his solicitors every month regarding the progress of the appeal when in July 2024 he finally found out that the appeal had not been lodged. Then, he retrieved the file from the previous solicitors and handed it over to his current solicitors on 31 July 2024 and the summons for extension of time to appeal was filed within a few days. He also claimed to have been misled by his previous solicitors who allegedly made him believe that the

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<sup>8</sup> **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

<sup>9</sup> **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)

<sup>10</sup> **Avery v Public Service Appeal Board** (supra)

<sup>11</sup> **Latchmi v Moti** (supra)

<sup>12</sup> **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

<sup>13</sup> **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA ABU0026.2013 (26 February 2016)

<sup>14</sup> **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

appeal was on foot (when it was not) and they were waiting for a date. He admitted that once his then solicitors had given him a draft of the notice of appeal without a number or signature which is attached to the appellant's affidavit.

[11] However, I find from the affidavit in opposition of the respondent, that a notice of appeal bearing No. 081 of 2022 signed by the appellant's previous solicitors on 01 December 2022 had indeed been filed within the appealable period. The draft of the notice of appeal produced by the appellant is exactly the same. Therefore, his statement under oath that his previous solicitors had not filed the appeal and misled him is far from being true. The appellant has admitted in his reply affidavit that an appeal had indeed been filed on 08 December 2022, yet maintained that his previous solicitors did not tell him about the appeal but offered no fresh justification for the delay. But, from his original affidavit it appears that his previous solicitors had in fact 'made him believe' that the appeal was on foot. Thus, the appellant's explanation for the delay too is incredible. The appellant seems to have lied under oath initially but forced to admit the truth about the original appeal upon being confronted with a copy of it by the respondent.

[12] I have perused the court file on ABU 081 of 2022. The notice of appeal had been filed on 09 December 2022. However, as no steps had been taken since then, the President, CA had dismissed the appeal in terms of section 20 (1) (g) read with section 12 of the Court of Appeal Rules on 07 July 2023 for want of prosecution. Therefore, the appeal process in the Court of Appeal had come to an end and this Court is *functus* as far as any appeal or an application seeking enlargement of time to appeal against the impugned judgment is concerned. However, as the parties and this court, being unaware of this position regarding ABU 081 of 2022, proceeded to the hearing of the appellant's enlargement of time to appeal application, I shall deal with that as well for formality sake.

[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 in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers<sup>15</sup>.

[14] The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said<sup>16</sup> 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.

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<sup>15</sup> 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)

<sup>16</sup>**Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

[15] However, Dr. Almeida Guneratne, P took a different view later and said<sup>17</sup> that if the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case*** ) are explained to 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.

[16] 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*.

[17] Therefore, I will consider the prospects of the appellant's appeal before the Full Court, for interest of justice demands that I take a holistic approach<sup>18</sup> 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.

[18] Out of 11 proposed grounds of appeal, there is only a single issue that needs serious consideration as highlighted by the appellant's written submissions and oral submissions

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<sup>17</sup> **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

<sup>18</sup> **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

by his counsel. The issue is that Crown Lease No.8873 had already expired in 1994 when Shyam Lal and the respondent entered into the Sale and Purchase Agreement in 2001. Therefore, the appellant argues that Sale and Purchase Agreement had no validity and could not be enforced.

[19] Upon reading the judgment, I find that the following matters have been agreed to between the parties:

- (i) Shyam Lal and the respondent entered into the Sale and Purchase Agreement in 2001 in respect of the land described in Crown Lease No.8873.
- (ii) Crown Lease No.8873 expired in 1994.
- (iii) On 17 July 2018, the Director of Lands informed Shyam Lal that a new 99-year agricultural lease with effect from 01 January 1995 had been registered in his name.
- (iv) The land contained and described in former Crown Lease No.8873 is the exact and the same land contained in State Lease No.21650.
- (v) On or about 01 August 2018 Shyam Lal wrote to the director of Lands and requested a transfer of Crown Lease No. 8873 which was renewed to State Lease No.21650 to the plaintiff.
- (vi) On or about August 2018 Shyam Lal filed an application with the Director of Lands seeking consent under section 12 of the State Lands Act to transfer State Lease No.21650 to the plaintiff.

[20] These agreed facts make it absolutely clear that without any doubt both parties agreed at the pre-trial conference that the subject matter of the Sale and Purchase Agreement is none other than what was described in Crown Lease No.8873 and later in State Lease No.21650. That also explains why the appellant did not challenge the Sale and Purchase Agreement at the trial stage.

[21] The subject matter of the Sale and Purchase Agreement signed on 20 March 2001 is the land described in State Lease No.21650 for which Shyam Lal had a valid lease for 99 years

since 01 January 1995. The fact that Crown Lease No.8873 on the same land expired in 1994 has no bearing at all on the Sale and Purchase Agreement signed on 20 March 2001. Thus, I do not see any merit in the appellant's argument about Shyam Lal having had no title to the subject matter of the Sale and Purchase Agreement after 1994. The appellant totally fails in the consideration of prospects of his appeal.


[22] Finally, if extension of time to appeal the impugned judgment is allowed it would seriously and unfairly prejudice to the respondent who had fulfilled all obligations on his part and is waiting for the subject matter of the Sale and Purchase Agreement to be transferred to him by the appellant. It is over 24 years since the Sale and Purchase Agreement was entered into and the respondent had completed payment by 05 September 2012.

[23] Therefore, I am not inclined to grant the appellant leave to appeal out of time and his application to stay of execution pending the hearing and appeal in the Court of Appeal is thus redundant.

**Orders of the Court:**

1. *Summons for extension of time to appeal (& leave to appeal) the High Court judgment dated 07 November 2022 is refused.*
2. *Request that execution of the judgment pending hearing of this application and appeal is stayed is pro forma refused.*
3. *Appellant is directed to pay \$2500.00 to the respondent within 21 days hereof.*



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

**Solicitors:**

O'Driscoll & Co. for the Appellant  
Gordon & Co. Barristers & Solicitors for the Respondent