

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

CIVIL APPEAL NO. ABU 059 of 2024
[In the Lautoka High Court Action No. HBC 171 of 2015]

BETWEEN : **RAHAMAT ALI** of Vomo Street, Lautoka and businessman.

Appellant

AND : **BANK OF SOUTH PACIFIC LIMITED** trading as Bank of South Pacific having its registered office at Level 3, BSP Life Centre, Thompson Street, Suva, Fiji and carrying on business elsewhere in Fiji as bankers.

1st Respondent

HOUSING AUTHORITY a body corporate established under the Housing Authority Act.

2nd Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. S. Haritage for the Appellant**
Ms. S. Devan for the 1st Respondent
Ms. S. Ravai for the 2nd Respondent

Date of Hearing : **16 October 2025**

Date of Ruling : **24 October 2025**

RULING

[1] The appellant (original plaintiff) filed Writ of Summons and the Statement of Claim (SOC), seeking *inter alia* a sum of \$ 1,000,000.00 (One Million Dollars) being damages for loss of business and customers and damages for stress, anxiety, distress, and embarrassment. However, surprisingly the appellant in his Statement of Claim (SOC) has not prayed for:

- A. *an Order declaring that a fraud has been committed by the Defendants (particularly by the 1st Defendant Bank) during the process of granting the loan and/ or overdraft and/ or other facilities to the Western Wreckers Limited.*
- B. *an Order declaring the impugned Mortgage Bond to be cancelled or to be made null and void on account of the alleged forgery.*
- C. *a relief declaring that he (the plaintiff) remains as the Title holder of the subject property with no encumbrance.*
- D. *a declaration that he did not sign any of the following instruments, namely.*

[2] The 02nd respondent (02nd defendant) filed its Statement of Defence moving for the dismissal of the appellant's action, and the 01st respondent (01st defendant) filed its Statement of Defence and moved for the dismissal and striking out of the appellant's Writ of Summons and the Statement of claim. The 01st respondent also moved for a judgment in a sum of \$ 678,607.59 with interest as per its counter claim.

[3] The appellant was said to be the guarantor for the loan facilities granted to an entity called WESTERN WRECKERS LIMITED, initially by HABIB BANK LIMITED and subsequently by its successor BANK OF SOUTH PACIFIC LIMITED, the 01st respondent. He had alleged that he had no knowledge of the loan facilities or of any mortgage obtained by the 01st respondent that was registered over a property i.e. Housing Sub-lease No.226649 in that the 01st respondent had fraudulently acquired a mortgage over his property.

[4] The trial judge in the judgment has relevantly said:

- 24. *The practice of obtaining of financial facilities by the Plaintiff, by pledging the property in question, has a long history, which commenced in the year 1997 firstly by obtaining a facility in the name of an entity called "Albie Muffler House Fiji Ltd" as the Mortgagor and the **Habib Bank Limited** being the Mortgagee as evidenced "PEX-3". This is not disputed by the Plaintiff. Thereafter, 2 further*

facilities have been obtained by the Plaintiff's Company from the HABIB BANK LIMITED as evidenced by the "IDEx-3" and "IDEx-4" in the years 2002 and 2004 respectively for which, undisputedly the Plaintiff was a signatory as a guarantor.

25. *The practice of obtaining further facilities, while the previous loan amounts remained fully unsettled, has continued unabated as evidenced by the annexures marked as "IDEx-7" dated 22nd February 2012, "IDEx-8" dated 1st June 2012, "IDEx-9" dated 4th June 2012, "IDEx-10" dated 08th October 2012 and finally by the aforesaid "IDEx-1" dated 31st July 2013, which the Plaintiff is disputing to have signed by him.*

[5] The High Court on 05 April 2024¹ struck out and dismissed the appellant's Writ of Summons and the Statement of Claim subject to costs and ordered that the 01st respondent was at liberty to proceed with the mortgage sale, in order to recover its dues, together with the statutory interest.

[6] The appellant has filed summons on 24 June 2024 for leave to appeal and extension of time to appeal the High Court judgment.

Law on enlargement of time

[7] It is settled that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time². 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 consideration³ (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

¹ **Ali v Bank of South Pacific Ltd (trading as Bank of South Pacific)** [2024] FJHC 243; HBC171.2015 (5 April 2024)

² **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)

³ 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]

be unfairly prejudiced?⁴ 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 application⁵. 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 parties⁶. 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 applicant⁷.

[8] 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.⁸

[9] 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.⁹ The last date is determined by calculating the length of time from the date on which the judgment or order of court below was *pronounced* (vide Rule 16 of the Court of Appeal Rules).

⁴ **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.

⁵ **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

⁶ **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

⁷ Per Marsack, J.A. in **Latchmi v Moti** (supra)

⁸ **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

⁹ **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

[10] In this case the judgment was pronounced on 05 April 2024 and the appellant had time till 17 May 2024 to file notice of appeal. His summons for extension of time to appeal was filed on 24 June 2024 and therefore it is out of time by more than 05 weeks (38 days). This length of the delay is substantial. The delay of 35 days is substantial and requires an explanation¹⁰. 40 days have been considered ‘a significant period of delay’¹¹. 15 ½ months delay is by any standard inordinate¹². Delay of 11 days¹³ and 47 days¹⁴ also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation¹⁵. 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.¹⁶

[11] 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.¹⁷

[12] The appellant’s explanation is that after the judgment was delivered, he informed his counsel of his intention to appeal but had to undertake a few trips abroad. However, it appears that he was in Fiji from 17 April 2024 after his trip to Hong Kong on 13 April 2024 and left Fiji again only on 09 May 2024 for New Zealand. He had flown to Japan again on 17 May 2024 from Fiji meaning that he had come back from New Zealand (return date not disclosed) and was in Fiji. Thus, there was no reason for his counsel not to have filed the notice of appeal in time particularly due to the appellant’s absence periodically from Fiji. Nor do I accept that the appellant could not be reached during his absence from Fiji as

¹⁰ **Yee v Commissioner of Police** [2019] FJCA 143; ABU142.2018 (12 July 2019)

¹¹ **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)

¹² **Abbco Builders Ltd v New India Assurance Co Ltd** [2019] FJCA 66; ABU13.2018 (10 May 2019)

¹³ **Avery v Public Service Appeal Board** (supra)

¹⁴ **Latchmi v Moti** (supra)

¹⁵ **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

¹⁶ **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA ABU0026.2013 (26 February 2016)

¹⁷ **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

electronic communication by email (for example) knows no geographical boundaries. I do not accept that the appellant has explained the reason for the delay satisfactorily.

[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 lawyers¹⁸.

[14] The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said¹⁹ 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

¹⁸ 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)

¹⁹ Fiji Industries Ltd v National Union of Factory and Commercial Workers [2017] FJSC 30; CBV0008.2016 (27 October 2017)

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.

[15] However, Dr. Almeida Guneratne, P took a different view later and said²⁰ 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*.

²⁰ *Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary* [2022] FJCA 190; ABU0020.2022 (30 December 2022)

- [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 approach²¹ 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] I have examined the appellant’s proposed grounds of appeal and find that the primary issue before the High Court was whether the appellant had established fraud through his evidence in order to challenge the bank’s rights as mortgagee of his property. The appellant, as the High Court judge remarked, has totally failed in his monetary claim for lack of evidence.
- [19] Taken together, there is no merit in the 01st and 04th grounds of appeal based on the refusal of the appellant’s application to recall the 02nd respondent’s witness in as much as his counsel had ample opportunity of cross-examining this witness when the witness gave evidence on the grant of consent. Secondly, in any event the consent being challenged by the appellant had already been given prior to the appellant’s letter of objection dated 18th November 2013 marked as “DEx-6” (with the relevant fees for consent being paid on 19th September 2013 as evidenced by “2DEx-3”) pursuant to the application made on 04 September 2013 signed by the appellant, as evidenced by the annexure marked as “2DEx-2”.
- [20] On the issues raised by the appellant in the 02nd ground of appeal, I agree with the trial judge that in the absence of any substantial relief prayed for in his SOC in relation to the subject matter of the mortgage and the title to it, no interim injunction against the respondents could have been issued and remained in force. Thus, I agree that the impugned *ex-parte* interim injunction issued on 8 October 2015 was redundant and no purpose would be served by allowing it to continue any further as far as plaintiff’s final reliefs were concerned. Accordingly, the trial judge had to vacate the *ex-parte* interim injunction as prayed for by the respondents.

²¹ Hussein v Prasad [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)


- [21] There is nothing hearsay about the evidence of the 01st respondent's witness as his evidence was based on documents out of which only his signature on 1DEX-1 dated 31 July 2013 was not accepted by the appellant as he took up the position that he did not sign it in that it was signed by someone else. Even if the loan officer who handled the transaction had come to give evidence, the appellant would have challenged 1DEX-1 on the same basis, for otherwise he had no defence at all in the case. In any event, the burden of proof of alleged fraudulent signature was fairly and squarely on the appellant. He failed to discharge that burden. Thus, the 03rd ground of appeal has no merits.
- [22] The trial judge did not err at all in saying that there should primarily have been evidence from an expert witness produced by the appellant that 1DEX-1 did not have his signature because the appellant's own evidence as to whether 1DEX-1 had his signature or not, to say the least was ambiguous. He was not sure whether it was his signature or not. His answers were vague and evasive. He had to prove affirmatively that it was not his signature which he failed to do as he did not call any other evidence. The 05th ground of appeal has no prospect of success.
- [23] There is no basis for the complaint in the 06th ground of appeal as all. What the trial judge has said is that the appellant has abused the process of the court by instituting the action and the action has to be dismissed with reasonable sum of costs in favour of the respondents.
- [24] The appellant's complaint under 07th ground of appeal seems to be the trial judge's statement that if he had resigned as a Director of the Company (Western Wreckers Limited) way back in 2005 (as his counsel suggested to the 1st respondent's witness - Bank Officer) the appellant could not have faced or suffered any damages or stress, anxiety, distress, and embarrassment as he alleges in his SOC. The judge has said that this position that he had resigned in the years 2005 was neither in his pleadings nor in the issues, but was only an afterthought. I see no error in that conclusion in the light of the totality of pleadings and evidence at the trial.

- [25] The prospect of success threshold for enlargement of time to appeal is similar to leave to appeal on interlocutory orders²². The key consideration is whether the appellant’s purported appeal grounds have a realistic prospect of success. 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?*”²³.
- [26] I am inclined to hold that none of the proposed appeal grounds has a real prospect of success.
- [27] As for the prejudice to the respondents, I have no hesitation to conclude that particularly the 01st respondent would be seriously prejudiced by allowing the appellant to litigate this matter any further in the Court of Appeal with little prospect of success as the 01st respondent could not recover a sum of \$678,607.59 due for almost 10 years.

Orders of the Court:

1. *Appellant’s application for enlargement of time to appeal the High Court judgment dated 05 April 2024 is dismissed.*
2. *Appellant is directed to pay \$2500.00 to the 01st respondent and \$2000.00 to the 02nd respondent as costs within 21 days hereof.*




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

Solicitors:

Iqbal Khan & Associates for the Appellant
Messrs Neel Shivam Lawyers for the 1st Respondent
Housing Authority Legal Counsel for the 2nd Respondent

²² **Malani v Director of Public Prosecutions** [2025] FJCA 82; ABU019.2022 (6 June 2025) at [6] – [8]

²³ **Fatiaki v Mobil Oil Australia Pty Ltd** [2025] FJCA 52; ABU80.2024 (26 March 2025) at [11] – [16]