

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

CIVIL APPEAL NO. ABU 082 of 2025
[In the High Court at Suva Case No. HPP 069 of 2023]

BETWEEN : **ASHOK KUMAR** of 46 Lavenia Crescent, Mangere East, Auckland,
New Zealand, Administrator of the Estate of the Late Mangaru.

Appellant

AND : **HEMANT KUMAR** of Calia, Navua, Farm Worker.

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Ms. Y. Kumar for the Appellant**
Ms. P. Nand for the Respondent

Date of Mention : **16 March 2026**

Date of Ruling : **20 March 2026**

RULING

[1] The appellant (original 01st defendant) has filed summons for leave to appeal out of time the decisions made by the High Court on 31 January 2024 and 17 April 2025. The respondent (original plaintiff) has attached to his affidavit copies of the order made on 31 January 2024 and the decision dated 17 April 2025. There was another defendant (02nd defendant) in the High Court proceedings who for an inexplicable reason has not been made a party to the current summons.

- [2] The respondent has by originating summons initiated High Court proceedings pursuant to section 35 of the Succession, Probate and Administration Act. He sought orders to remove the appellant (and the other defendant Shakuntala Devi) as trustee/administrator pursuant to Probate Grant No. 38672, provide for estate accounts and revoke the current administrator and the respondent to be appointed in lieu of the appellant.
- [3] According to the decision dated 17 April 2025, the High Court judge Justice Vishwa Datt Sharma has perused the court record and it has revealed that on 31 January 2024 the presiding judge, Justice Javed Mansoor was informed that the appellant (and the 02nd defendant) were served out of the jurisdiction of court and that no affidavit in opposition was filed by the them to challenge the orders sought by the respondent.
- [4] I examined the affidavit of service filed by Deputy Registrar of the District Court North Shore (Auckland, New Zealand) and found that at 6.25pm on 19 December 2023, originating summons and affidavit dated 23 September 2023 had been personally served on the appellant at the address given in the caption. The appellant has therefore lied under oath when he says in his supporting affidavit filed with summons for enlargement of time to appeal in this court that he received originating summons on 28 January 2024 at his address at 46 Lavenia Crescent, Mangere East, Auckland, New Zealand.
- [5] Justice Mansoor had then proceeded to grant the orders sought by the respondent enumerated in his originating summons and the case record had been closed. It appears that the originating summons had required the appellant (and the 02nd defendant) to attend court for the hearing of the originating summons on 29 January 2024 and after the inquiry in the absence of the appellant and the 02nd defendant on that day, the orders had been formally made as per the originating summons on 31 January 2024.
- [6] The appellant claims to have engaged Jiten Reddy Lawyers on 05 February 2024. On 06 February 2024, Jiten Reddy Lawyers filed notice of appointment of solicitors to act and represent the appellant and the 02nd defendant. Thus, Jiten Reddy Lawyers were well within

time to lodge an appeal against the final orders made on 31 January 2024. They had 06 weeks to do so. But, they failed to act.

[7] The main argument of the appellant is that Justice Mansoor's final orders were made in breach of the time frame when service of summons is done for overseas residents. In terms of O.11, r. 6(1) & (2) read with O.11, r. 1(2) of the High Court Rules, where originating summons is to be served out of the jurisdiction, the time to be inserted in the summons within which the defendant must acknowledge service should be 42 days.

[8] The summons was served on the appellant on 19 December 2023 whereby the appellant was required to attend court for the hearing on 29 January 2024. Thus, he had 41 days (excluding the day of service but including the day of hearing) to attend court. If the day of service is included it is 42 days. It appears that though Justice Mansoor made orders on 29 January, they were formalized on 31 January 2024. Thus, for the purpose of his current summons for enlargement of time to appeal, the appellant has treated those orders as having been made on 31 January 2024. The appellant could still have made an appearance through a lawyer and sought time to file his affidavit in opposition on 31 January 2024. However, he has retained Jitten Reddy Lawyers only on 05 February 2024. Therefore, there is no real prospect of success in this complaint in appeal.

[9] The appellant also complains that Justice Sharma was wrong to have dismissed his 'interlocutory summons' seeking an extension of time to file an affidavit in opposition to the respondent's originating summons. It is clear that in the face of Justice Mansoor's orders, Justice Sharma had no alternative but to strike out the appellant's said summons. This ground of appeal has no success of prospect either.

[10] According to the appellant's affidavit, Jitten Reddy Lawyers represented him on 04 April 2024 where Justice Sharma allegedly set aside the orders made on 29 January and him time to file response within 21 days. He has attached a note from Jitten Reddy Lawyers to prove that statement. However, in the decision dated 17 April 2025, Justice Sharma has said nothing even remotely close to that. Neither did Justice Sharma set aside the orders made on

29 January 2024. Nor did the judge allow the appellant time to file his opposition. Be that as it may, the appellant's solicitors did not comply with that alleged directive either. The appellant says that his lawyers then asked for and obtained further 21 days for opposition. Nothing of this sort has happened. Justice Sharma has not granted further time to the appellant's lawyers.

[11] However, it appears from the decision dated 17 April 2025 that Jitten Reddy Lawyers has filed 'interlocutory summons' on 28 November 2024 seeking enlargement of time to file the appellant's affidavit in opposition. Justice Sharma heard the matter on 20 March 2025 and delivered the decision on 17 April 2025. He said:

[11] The Question then arises is that when the Court had already determined the substantive originating summons of the Plaintiff on 31st January 2024, and that the matter had come to an end, was there any need for Jiten Reddy Lawyers to file this interlocutory summons and seek an order for an extension of time to file and serve the Defendants affidavit in opposition?

[13] However, since the orders on the substantive originating summons was already granted on 31st January 2024 that was the end of the matter,

[12] Justice Sharma has put the blame fairly and squarely at the feet of Jitten Reddy Lawyers for not having pursued the case record to ascertain what had happened in the case and made the timely appropriate applications but having pursued a rather futile 'interlocutory summons'.

Law on enlargement of time

[13] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time¹. 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

¹ **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)

court's consideration (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?² 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 application³. 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 parties⁴. 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 applicant⁵.

[14] 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.⁶

[15] 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.⁷ The length of the delay in the case of the appellant is a little over 02 weeks. 40 days have

² **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.

³ **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

⁴ **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

⁵ Per Marsack, J.A. in **Latchmi v Moti** (supra)

⁶ **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

⁷ **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

been considered ‘a significant period of delay’⁸. Delay of 11 days⁹ and 47 days¹⁰ also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation¹¹. 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.¹²

[16] 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.¹³

[17] The current summons was filed on 18 August 2025. The enormous length of delay from 29/31 January 2024 is not excusable, nor explained. Even the delay from 17 April 2025 is substantial and not satisfactorily explained. The reasons adduced for such delay are not substantiated by evidence and some of them are blatantly contrary to the material available to this court. The appellant has lied regarding the date of service of originating summons. He has not come to court with clean hands seeking the indulgence and discretion of this court. In **Sea Pilots (Fiji) Ltd v Peckham** [2025] FJCA 12; ABU055.2024 (17 February 2025) this court held:

[24] *The principle that a party seeking leave to appeal must come to court with clean hands is recognized in appellate practice. This principle is often linked to equitable considerations and the broader interests of justice when deciding whether to grant leave to appeal an interlocutory order. A party seeking leave to appeal should not have delayed the trial court proceedings when they could have proceeded. Courts take into account whether the applicant has acted fairly and diligently. If the party seeking leave contributed to unnecessary delay, the*

⁸ **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)

⁹ **Avery v Public Service Appeal Board** (supra)

¹⁰ **Latchmi v Moti** (supra)

¹¹ **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

¹² **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)

¹³ **Ratnam v Cumarasamy** [1964] 3 All E.R. 933


court may refuse leave on discretionary grounds, applying the clean hands principle in the interests of justice.'

[18] The grounds of appeal set out in the proposed notice of appeal do not have a realistic prospect of success. The subject matter concerns an application by the respondent under section 35 of the Succession, Probate and Administration Act 1979. The orders for the removal of the appellant and the other defendant as executor and executrix of the estate of the late Manguru have been granted as far back as in January 2024. Therefore, allowing extension of time to appeal would cause prejudice to the respondent who is now the administrator.

Orders of the Court:

1. *Enlargement of time to appeal as prayed for in the summons filed on 18 August 2025 is refused.*
2. *Summons for leave to appeal out of time is struck out.*
3. *Appellant is directed to pay \$2500.00 as costs of this application to the respondent within 21 days hereof.*




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

Solicitors:

Jiten Reddy Lawyers for the Appellant
Amerinz Legal for the Respondent