

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL NO. HBC 229 of 2009

BETWEEN : Sefanaia Rika
PLAINTIFF

AND : The Principal of Lelean Memorial School
FIRST DEFENDANT

AND : The Trustees of the Methodist Church of Fiji
SECOND DEFENDANT

COUNSEL : Mr Singh D for the Plaintiff
Ms Nayacalevu S for the Defendants

Date of Judgment : 14 November 2013

JUDGMENT

1. This is an application made by the Defendants seeking following orders:
 - [a] For an Order for Leave to appeal out of time the Judgment made by his Lordship Judge Hettiarachchi at the Suva High Court on the 6 day of July 2012.
 - [b] For an extension of time to appeal the Judgment by his Lordship Judge Hettiarachchi at the Suva High Court on the 6 day of July.

[c] For an Order for stay of execution of the Judgment made by his Lordship Judge Hettiarachchi at the Suva High Court on the 6 day of July 2012 respectively pending the final determination of this Application and Appeal.

[d] That the costs of this Application be costs in the cause.

[e] Any further or other orders that this Honourable Court may deem just.

Facts Briefly

2. The Plaintiff brought an action as the administrator of the estate of his late daughter Sera Nairusa Rika (the deceased) who died due to electrocution on 24.11.2006 at Lelean Memorial School, Davuilevu, Nausori. This incident pertaining to this action occurred while the deceased was walking within the school compound.
3. The Plaintiff alleged that the said incident took place due to the negligence or breach of statutory duty on the part at the Defendants and/or their servant and agents. The Plaintiff also alleged that the Defendants failed to discharge their common law duty of care to the deceased in breach of the occupied liability Act.
4. The Plaintiff claimed inter alia special damages for loss of expectation of life, Damages under the law Reforms (Miscellaneous provisions), (Death and interest) Act, for loss of prospective earnings, damages for stock, anxiety and distress, interest and costs.
5. The learned judge by his judgment dated 6 July 2012 made an order in favour of the Plaintiff for a sum of \$51,774.00, for the loss sustained by the Plaintiff as result of the electrification.

6. The Defendants filed summons for leave to appeal out of time and stay of execution on 13 September 2012 supported by an affidavit of Reverend Tevita Nawadra sworn on 13 September 2013 and served on the solicitors for the Plaintiff on 5 December 2012.
7. The affidavit in opposition was filed on behalf of the Plaintiff opposing the Defendant's application for leave to appeal out of time and stay of execution.

Leave to Appeal Out of Time

8.
 - [i] The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles.
 - [ii] The principles governing the grant of leave to appeal out of time are set out in **Avery v No. 2 Public Service Appeal Board & Others [1973] 2 NZLR 86** where Richmond J said at p. 91.

“When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court.

The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attach the judgment from which he wishes to appeal.”

- [iii] The following factors are normally taken into account in deciding whether to grant an extension of time:
 - [a] the length of the delay.
 - [b] the reasons for the delay.

[c] the chances of the appeal succeeding if time is extended.

[d] prejudice to the Respondent.

C M Van Stillevoeldt B V v El Carriers Inc [1983] 1 WLR 207 at 212 cited in **Bahadur Ali, Muktar Ali, Niwaz Ali v Ilaitia Boila & Chirk Yam, Fiji Development Bank, Merchant Bank of Fiji**, Civil Appeal No. ABU 0030 of 2002 Court of Appeal, Suva (5 September 2002)].”

Application of Facts
Length of Delay

9. The Defendants filed the instant application 27 days after the expiration of 42 days for the appeal on the judgment by the court.
10. In the case of **Ali v Dominion Insurance Limited [2011]** HBC 132 of 2007 an application for leave to appeal was filed 16 days after the expiration of the time limit. The application was dismissed as no exceptional grounds were shown.
11. In the case of **Khan v Suva City Council** HBC 406 of 2008, the application for leave to appeal was filed with 22 days after the expiration of the time limit. The application was dismissed as there was no proper ground for the delay in seeking leave to appeal out of time.
12. In the case of **Mc Gaig v Manu** [2012] Civil Appeal CBV 0002 of 2012 [27 August 2012], Gates J held in a application to the Supreme Court for a grant of extension of time to appeal where the application was only 2 days out of time but declined to grant an extension of time.
13. The following passage from **Ratnam v Comaraswamy and Others [1964]** A.E.R 935, is very much relevant to the present application.

“The 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 requires

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 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 be providing a time table for the conduct of litigation.

14. In **Crest Chicken Ltd v. Central Enterprises Ltd [2005]** FJHC 87 Justice Pathik having cited the above case went on to state as follows:

“It has been stated time and time again that the Rules are there to be obeyed and non compliance with them could prove fatal as shown by decided cases.”

15. In **Revici v Prentice Hall Incorporated and Others (1969)** 1 All E.,R 772 it was held that:

“(i) The rules of the court must be observed and it mattered not that the Plaintiff had offered to pay the costs and that no injustice would be done to the other side.

(ii) If there was non-compliance of the rules it must be explained; and prima facie if no excuse was offered any indulgence should be granted.

16. In that case **Lord Denning M.R.** dealt with the issue of delay and non compliance with Rules as follows:

“Nowadays we regard time very differently from what they did in the 19 century. We insist on the rules as to time being observed. We have had

occasion recently to dismiss many cases for want of prosecution when people have not kept to the Rules as to time. So here, although the time is not so very long, it is quite long enough. There was ample time for considered). Moreover (and this is important), not a single ground or excuse is put forward to explain the delay and why he did not appeal. The Plaintiff had three and half month in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time anymore.”

Reason for the Delay

17. The affidavit filed by the Defendant deposed that the period from May to August in the year 2012 had been the busiest time for the Second Defendant as they were preparing for the Church Conference and the trustees had to personally co-ordinate fifty five divisions of the church. The deponent further deposed that due to the involvement in the conference, trustees were so busy and could not provide its solicitors proper instructions to appeal against the judgment. However, the Defendant admitted that its solicitors reminded the Defendant about the time to file an appeal in writing as well.

18. It is to be noted that the Defendants were very well aware of the appealable period against the judgment. The Defendants having been properly instructed by its solicitors appears to have not taken the instructions seriously until their conference was over to give instruction to its solicitors to appeal. In my view, despite of the nature of the conference held during that period, the Defendant could have easily provided necessary instructions to its solicitors to appeal. This is not a question where there is miscommunication between client and solicitors or ignorance of the party concerned with regard to the importance of adherence of rules, but considered the time requirement as not so important to be followed.

19. I am not inclined to consider the reason for delay as an acceptable ground to consider the application for leave to appeal out of time.

The Chances of the Appeal Succeeding if Time is Extended

20. The Defendants asserted that the learned Judge failed to consider the Defence of Contributory Negligence sufficiently in this matter. I have perused the Judgment and I conclude that the learned Judge in paragraph 43, 44, 45, 48, 51 and 52 has adequately dealt with the issue of contributory negligence and come to the conclusion that there is no evidence to support such findings. Therefore, I am unable to accept the assertion that the learned Judge failed to deal with the Defence of Contributory Negligence.
21. The Defendant also stated that the learned Judge had failed to set out his reasoning of his conclusion of the deceased's earnings enough to spend \$200 per month on her parents nor did the Judge set out the multiplier he has used to arrive at the total loss of future earnings being at \$36,000.00 for the General Damages.
22. It is important to note that the paragraph 64 of the judgment is incomplete and paragraph 65 and 66 are not available upon perusal of the judgment. The learned Judge has considered socio economic factors and the nature of jobs available in Fiji and the spending of \$200 per month on parents is just and fair. I have no reason to consider any sum other than \$200.00 was reasonable.
23. On careful reading of the judgment, it is observed that the relevant paragraphs dealing with the multiplier is missing from the judgment. The Defendant submitted that the incompleteness in the judgment, especially in relation to multiplier used for calculations of General Damages is a sufficient ground to succeed the appeal if time is extended.

24. I now turn to consider whether the specific non disclosure of the multiplier in assessing damages in the judgment is material or not.
25. In paragraph 67 of the judgment the learned Judge came to the conclusion that the deceased would have spent \$200.00 on her parents per month. That means the deceased would have spent \$2,400.00 per annum. The total sum awarded as General Damages was \$3,600.00. Taking into consideration of \$3,600.00 and \$2,400.00, the multiplier used by the judge in awarding General Damages is abundantly clear to this court, which is 15. The Defendant in its written submissions submitted the following chart to appraise court on the multipliers used by the courts in similar circumstances.

“Action No.	Parties	Age at death	Multiplier
ABU 0046/95 (Court of Appeal)	Ratu Isei Turaga v Helen Nina Work	36	14
C/A 373/1979 (Suva H/C)	Subamma v Chandra	34	16
C/A No. 407/97	Mono Lata v Jania Prasad	36	14
C/A 242/903S	Jaipal Singh v Ted Young	29	14
C/A 077/02S	Suman Lata v Enkaiya Narayan & Ors.	31	13
ABU 85/85 (Court of Appeal)	Josefa Sigavolavola v Giyan Mati	30	15
C/A 611/93S	Jai Narayan v Attorney General	33	11
C/A 40/96L	Bihi Nanson v Ramesh Chand	33	10”

26. Even taking into consideration of the information provided in the above chart, it is apparent that use of 15 as a multiplier is just and fair in the given situation.
27. Therefore I conclude that the incompleteness of judgment due to missing of two paragraphs from the judgment has not caused any prejudice to the Defendants on careful examination of the entire judgment.
28. Further, in the affidavit it is not sufficiently shown what injustice would be caused to the Defendants if an extension of time is not granted.
29. Having considered the underlying principles on granting an extension for a leave to appeal out of time, I conclude that rules are there to be obeyed and only in exceptional circumstances the court can use its discretionary powers to exempt a party from complying with rules. Hence, the party so applying for an exemption is under a duty to show exceptional circumstances without which the court shall not use its discretion. The Defendants in the present case is therefore required to show the existence of exceptional circumstances in order to overcome the delay.
30. If the court exercises its discretion and enlarge time without any valid ground it would frustrate the whole purpose of the rules, which set out a time table for the conduct of litigation.
31. Therefore, taking into account the facts of the affidavits and submissions tendered by both parties, I find that the Defendants have failed to provide sufficient material on which the court can exercise its discretion and grant leave to appeal out of time.
32. On the above premise, I dismiss the Defendant's summons for leave to appeal out of time.

33. The issue of stay of execution of the judgment does not arise as the court is not inclined to grant leave to appeal out of time.
34. There will be costs to the Plaintiff summarily assessed in the sum of \$1,000.00.

Susantha N. Balapatabendi
JUDGE