

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 107 of 2009

BETWEEN : **ATUNAI SA LACABUKA RASOKI**

PLAINTIFF

AND : **THE ATTORNEY-GENERAL OF FIJI or STATES OR GOVERNOR; LANDS MINISTER or CHIEF SURVEYOR or REGISTRAR**

FIRST DEFENDANT

AND : **NATIVE RESERVE COMMISSION, NATIVE LAND TRUST BOARD, FIJI MUSEUM**

SECOND DEFENDANT

AND : **SALESI TEMO**

THIRD DEFENDANT

Before : **Hon. Justice Kamal Kumar**

Counsel : Plaintiff/Applicant in Person

Mr A. Pratap for First Defendant/Respondent

Mr L. Komaitai for Firstnamed and Secondnamed
Second Defendants/Respondents

Mr J. Apted for Thirdnamed Second
Defendant/Respondent

N/A for 3rd Defendant/Respondent

DATE OF JUDGMENT : 24 June, 2014

JUDGMENT

(Application for Leave to Appeal out of Time)

1.0 Introduction

- 1.1 On 23 May 2013, Plaintiff filed Notice of Motion dated 9 April 2013 for Special Leave to Appeal at High Court which Motion was returnable on June 2013.
- 1.2 On 19 June 2013, Plaintiff appeared in person when it was revealed that he failed to serve the motion on the Defendants and as such this Court directed Plaintiff to serve the documents on the Defendants and Motion was adjourned to 27 June 2013.
- 1.3 On 27 June 2013, Plaintiff and Counsel for first and third named Second Defendants appeared and at Plaintiff's request for further time was allowed for service of the documents on the Defendants and Motion was adjourned to 31 October 2013.
- 1.4 On 31 July 2013, Plaintiff, Counsel for First Defendant and Thirdnamed Second Defendant were granted fourteen days to file Submission and this matter was adjourned for Ruling on Notice.

2.0 Notice of Motion Dated 9 April 2013 and Filed on 23 May 2013

- 2.1 The Orders sought by the Plaintiff are ambiguous as it does not clearly stipulate as to what Orders Plaintiff is seeking.
- 2.2 It appears though that the Plaintiff is seeking Leave to Appeal out of Time the decision of his Lordship Justice Calanchini delivered on 12 February 2010 and 19 July 2010 and Master Amaratunga (as he then was) decision of 15 February 2013.
- 2.3 On 12 February 2010, and 19 July 2010 his Lordship Justice Calanchini struck out the Plaintiff's Originating Summons against First Defendant, Thirdnamed and Second named Second Defendants, respectively.
- 2.4 On 15 February 2013, Master Amaratunga (as he then was) struck out the Originating Summons against Firstnamed Second Defendant.

3.0 Striking Out Of Originating Summons Against First Defendants, Thirdnamed and Secondnamed Second Defendants

3.1 Rule 16 of the Court of Appeal Rules provide:-

“16. Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that is to say-

(a) in the case of an appeal from an interlocutory order, 21 days;

(b) in any other case, 6 weeks.”

3.2 The time for appealing will depend on whether the decision by his Lordship Justice Calanchini is interlocutory or final.

3.3 The Full Court of Court of Appeal in **Woodstock Homes (Fiji) Ltd v. Rajesh** [2008] FJCA 104 in dealing with appeal from decision to dismiss application to set aside default judgment considered the issue as to when a judgment is interlocutory.

3.4 The Full Court made following comments:

“56. All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision. When there is a matter of doubt leave should be sought. Generally the distinction is that a final judgment finally disposes of the proceedings or finally determines the rights of the parties.

*57. In England the test whether an order is interlocutory or final depends on the nature of the application (**White v Brunton** (1984) QB 570).*

58. In **Suresh Chanran v Shan** (1995) 41 FLR 65 the Fiji Court of Appeal held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so and accordingly adopted the “application approach”.

59. However in **Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors** [2004] Vol 1 Fiji CA 213, a differently constituted Court of Appeal declined to follow Suresh Charan, (*supra*) holding that the “order approach” should be followed.

60. Different results will follow. If the **Suresh Charan v Shah** (*supra*) and the “application approach” is followed then an order refusing leave to apply for judicial review is an interlocutory matter. If **Jetpacker Works (Fiji)** (*supra*) and the “order approach” is followed then whether such an order is interlocutory would depend on analysing the circumstances of the case.”

3.5 Although the Full Court did not make a final determination as to which approach is to be applied by Fiji Courts it stated as follows:-

“61. Although, as stated above, these are not suitable proceedings to resolve the difference of approach, the prudent course for practitioners is to assume that where proceedings are commenced in the High Court in the Court’s original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

62. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal that ruling, order or declaration.”

3.6 The Full Court of Fiji Court of Appeal revisited this issue and **Goundar v.**

Minister for Health [2008] FJCA 40; ABU0075.2006S (9 July 2008).

3.7 The Full Court in **Goundars** case after overruling **Jetpacker** restated the law and stated as follows:-

*“35. It seems to this Court that the “application approach” is the correct approach for the reasons stated in **Suresh Charan v Shah** and for the additional reason for legal certainty.*

*36. As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in **Jetpacker** (supra) did. In overruling **Jetpacker** supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by practitioners. Practitioners and litigants need to know with certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave.*

37. This is the position. Where proceedings are commenced in the High Court in the Court’s original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.”

3.8 For legal certainty and applying the principle of “stare decisis” the approach to be adopted here is the application approach.

3.9 Hence, the time for appealing the decision to strike out action against First Defendants and Secondnamed and Thirdnamed Second Defendants expired on 5 November 2010 and 9 August 2010, respectively.

3.10 Rule 27 of Court of Appeal Rules provides:-

“27. Without prejudice to the power of the Court of Appeal, under the

Supreme Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period.”

3.11 This Court therefore does not have jurisdiction to extend time to appeal as it is the Fiji Court of Appeal which has discretion to extend time or not, once time for appeal has expired as is in this case.

4.0 Striking Out Action Against Firstnamed Second Defendant

4.1 The decision to strike out action against the first named Second Defendant was made by the Learned Master on 15 February 2013.

4.2 Order 59 Rules 9, 10 and 11 of the High Court Rules provides:-

“9. An appeal from an order or judgment of the Master shall be filed and served within the following period-

(a) 21 days from the date of the delivery of an order or judgment;

or

(b) in the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

10.-(1) An application to enlarge the time period for filing and serving a notice of appeal or cross-appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter-partes summons supported by an affidavit.

11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.”

4.3 In applying the application approach the Plaintiff/Applicant had 7 days to appear after grant of leave to appeal which had to be applied for within 14 days from date of decision.

4.4 Order 59 Rule 10 of the High Court Rules gives this Court discretion to extend time for appealing Masters Orders.

4.5 It was well established this Court has unfettered discretion to grant or refuse Leave to Appeal out of Time. The factors (which of course are not exhaustive) that needs to be taken into consideration when dealing with such applications are:-

- (i) Length of delay;
- (ii) Reason for the delay;
- (iii) Chance of appeal succeeding if time for appeal is extended; and
- (iv) Degree of Prejudice to the Respondent if application is granted.

CM Van Stilleveldto B V v. E L Carriene Inc. [1983] 1 ALL ER 699 of 704;
Norwich and Peterborough Building Society v. Steed [1992] 2 ALL ER 830 at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051 of 1994S – FCA as page J.

4.6 Hence the Court must be given facts, in the form of evidence explaining and/or covering these four factors.

Latchmi & Anor v. Moti & Ors (1964) 10 FLR 138.

4.7 **Length of Delay**

In **Revici v. Prentice Hall Incorporated & Ors** [1969] 1 ALL ER 772 – Lord Dennings M R rejecting the Appellant’s submission that time does not matters as long as costs are paid stated as follows:

“Nowadays we regard time very differently from what they did in the nineteenth century. We insist on rules at time being observed. ... so, here although time is not quite so very long, it is quite long enough.”

In **Revici's** case time for appeal had expired by one month.

- 4.8 In this instant Application for Leave to Appeal was to be filed within 14 days (Rule 11) from 15 February 2013 and file Appeal within 7 days of granting of Leave.
- 4.9 Application for Leave to Appeal out of Time was filed on 3 March 2013 that is almost 8 weeks (50 days) after time to file Application for Leave to Appeal had expired.
- 4.10 I find that there has been inordinate delay by the Applicant in filing the Application.

Reasons for delay

- 4.11 Lord Davies in **Revici's** case stated that:-

"... rules are there to be observed and if there is non-compliance (other than a minimal kind), that is something which has to be explained away.

Prima Facie if no excuse is offered, no indulgence should be granted"
(at 747 para F).

Application was refused in **Revici's** case as no explanation for delay was given.

- 4.12 In **1st Deo Maharaj** – the Court of Appeal adopted with approval the following quote from **Gallo v. Dawson** [1990] 64 ALJR 458 at 459.

"Case needs to be exceptional before a Court would enlarge by many months the time for lodging an appeal simply because the applicant had refrained from appealing until he/she had researched the issues involved. In Hughes v. National Trustees Executors & Agency Co. of Australasia Ltd [1978] VR 257, McInerney J pointed out (at 263) that

one object of fixing times under court rules is “to achieve a timetable for the conduct of litigation in order to achieve finality of judicial determinations.” When the time for appealing has expired, the litigation is at an end; the successful party is entitled to the benefit of the judgment in his or her favour. At that stage, the successful party has a “vested right to retain the judgment”. It would make a mockery of O 70, r 3 if, months after the time for appealing has expired, the unsuccessful party could obtain an extension of time on the ground that he or she had delayed appealing because that person wanted to research the issues involved. Lack of knowledge is a misfortune, not a privilege.”

- 4.13 In **Tevita Fa v Tradewinds Marine Ltd. & Anor.** – Civil Appeal No. ABU0040 of 1994 (FCA) – His Lordship Justice Thomson (as then he was) in dismissing Appellant’s application for extension to appeal made four days after the expiration of time to appeal stated:-

“The application for leave to appeal was fixed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August, 1994.”

In **Tevita Fa’s** case, it was submitted by Appellants’ Counsel that there had been a misunderstanding on the solicitor’s part as when time started running for Appeal.

- 4.14 The following explanation for delay has been held to be unsatisfactory and not a basis for granting extension by the Fiji Court of Appeal:-

- Oversight by instructing solicitor due to Appellant’s commitment in Australia even when the Appellant’s solicitor was engaged in a Supreme

Court (now High Court) criminal trial at relevant time for filing appeal. **Jawant Singh v. Peter Francis** (Action No. 57 of 1973 FCA (cyclostyled judgment) – Marsack JA (referred to in 1st Deo’s case at page 3)).

- Misunderstanding as to when time for appeal started running.

[Tevita Fa’s case]

- a misunderstanding of the effect of Court of Appeals judgment concerning the Special Damages.

Attorney General of Fiji & Anor v. Paul Praveen Sharma – Civil Appeal No. ABU0041/93S – FCA.

- Applicant’s solicitor mistakenly thought they had 30 days in which to appeal from the date on which judgment was served (Applicant’s solicitors to be blamed – not applicant).

[Latchmi’s case]

4.15 No Affidavit has been filed by the Plaintiff/Applicant to explain the reasons for delay. This is fatal to Plaintiffs Application for Leave to Extend Time as without any explanation for reason for delay no indulgence will be granted.

4.16 However for sake of completeness I will consider the other factors.

Chance of Success of Appeal

4.17 His Lordship Justice Richmond in **Avery v. No. 2 Public Service Appeal Board & Ors** [1973] 2 NZLR 86 stated as follows:

“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 attack the judgment from which he wishes to appeal.”

4.18 In **Tevita Fa’s** case his Lordship Justice Thomson stated as follows:

“However, as important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.”

4.19 At paragraph 3 of the Notice of Motion Plaintiff states as follows:-

“3. That the 15th day of February 2013, decisions by the Master of the High Court had breached Decree number 7 of 2013, Cap 134. sec 18 and 19 of the NRC and NLC joint sittings at Sadro village dated the 28th April, 1999, to check corrupt fraud land transfers made in 1875 - 2013 on Itaukei lands without notice or an NRC sittings enquiries done that breached Customary Laws and Bill of Rights on sec 16(1) of supreme laws under the 2013 Constitution Drafts of Fiji.”

4.20 The reason for striking out the action against the Firstnamed Second Defendant by the Learned Master Amaratunga (as he then was) is stated at paragraphs 11 and 12 of his Ruling which is as follows:-

“11. The originating summons does not comply with the said rules and cannot be easily understood. The originating summons and the affidavit refer to all the Defendants and not specifically to 1st, 2nd and or 3rd Defendants and 1st Defendant comprised of several entities and 2nd Defendant also comprised of several parties, so it is not clear which allegation is made against whom and what is the relief Plaintiff is seeking against each party.

12. The relief sought by the Plaintiff is mainly revolves as regards to return of certain lands, which Justice Calanchini (as his lordship then was) decision dated 12th February 2010 has clearly held as not possible under Section 15 of the State Proceedings Act.”

4.21 Plaintiff/Applicant has not provided any evidence to show that the Learned Master applied wrong principle in striking out Plaintiff's claim against the first named Second Defendant.

4.22 I have perused the Originating Summons filed by the Plaintiff and agree with the comments made by Learned Master in respect to the Originating Summons.

4.23 I find that Plaintiff/Applicant has failed to show that he has any prospect of success in appeal of time for appeal is extended.

Prejudice to the Respondent

4.24 In **Avery's** case his Lordship Justice Richmond at page 92 further stated:-

"The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved."

4.25 His Lordship Justice Marsack JA in **Latchmi's** case stated:-

"In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the Appellant."

4.26 It is evidently clear that the relief sought by the Plaintiff/Applicant and filing of Application without due regard to the Rules of Court and the Law puts the


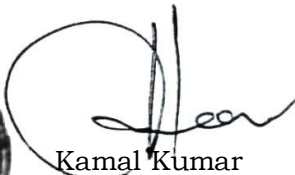
Defendants to unnecessary expense and waste of resources.

5.0 Conclusion

5.1 I hold that the delay in filing Leave to Appeal Out of Time is inordinate, Plaintiff/Applicant has failed to explain the delay in filing Application for Leave to Appeal Out of Time, appeal has no real prospect of success if time for appeal is extended and the Defendants will be prejudiced in opposing an unmeritorious appeal.

5.2 Accordingly I make following Orders:-

- (i) Notice of Motion for Special Leave to Appeal at High Court dated 9 April 2013 and filed on 23 May 2013 is struck out and dismissed;
- (ii) Plaintiff/Applicant is to pay First Defendants Costs assessed at \$750.00;
- (iii) Plaintiff/Applicant is to pay Firstnamed, Secondnamed and Thirdnamed Defendants costs assessed at \$750.00 each.

 
Kamal Kumar
JUDGE

At Suva
24 June 2014

Plaintiff:	In Person
Solicitors for the 1 st Defendant:	Office of the Attorney-General of Fiji
Solicitors for the Firstnamed and Secondnamed 2 nd Defendants:	Legal Officer, Legal Department
Solicitors for the Thirdnamed 2 nd Defendant:	Munro Leys