

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

High Court Civil Appeal No. HBM 04/2013  
[Civil Action No. 254 of 2011]

**BETWEEN** : **AMBIKA PRASAD** of Field 5 Sabeto Nadi.

**Applicant**

**AND** : **ELIKI KINIVALE** of Carreras Road, Votualevu, Nadi.

**Respondents**

Appearances : Mr E. Maopa for Applicant  
Respondent in Person

## **R U L I N G**

### **INTRODUCTION**

1. Before me is a Summons dated 08 August 2013 and amended on 03 September 2013 seeking the following:
  - (i) That leave be granted to extend time to appeal the Judgement delivered by His Worship Mr. Samuela Qica on 11<sup>th</sup> May 2013 in Nadi Magistrates Court Civil Action No. 254 of 2011.
  - (ii) That leave be granted to appeal out of time.
  - (iii) That the execution of the Judgement/Order be stayed forthwith
  - (iv) That costs be in cause
2. The application is supported by an affidavit of Ambika Prasad sworn on 01st August 2013 and filed on 08 August 2013 and by a supplementary affidavit filed on 23 October 2013.
3. The Respondent has not filed any affidavit in opposition. He has only appeared once, in person, on the first call over date on 10 September 2013. After that, he never again appeared in Court.

### **DISCUSSION**

4. Order XXXVII Part 1 of the Magistrates Court Rules provides that an appellant must give notice of intention to appeal within 7 days after the decision was given and under Part III and file at the Magistrates Court his grounds of appeal within one month from the date of the decision:
  - I. Notice of Intention to Appeal
    1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision

was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal :

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.

#### II. Security for Payment of Costs

2.- (1) Upon receiving notice of intention to appeal, the court below may in its discretion order the appellant to give security, to the satisfaction of the court if the parties differ, in such sum as the court shall direct, either by deposit, or by bond in Form 35 of Appendix A, for the payment of all such costs as may be awarded to any respondent by the appellate court.

(2) Where the security is by bond-

(a) the bond shall, unless the court otherwise directs, be given to the respondent;

(b) if the appellant is unrepresented, the bond shall be prepared by the court.

#### III. Grounds of Appeal

3.- (1) The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.

(2) At the time the appellant files the grounds of his appeal he shall deposit with the clerk of the court below such sum as the clerk shall consider sufficient to cover the fees prescribed in Appendix B for the preparation, certification and copying of the record.

5. Clearly, the appellant has failed to comply with Order XXV II of the Magistrates Court Rules.
6. In any given case, whenever an intended appellant fails to comply with the above stipulated time, it becomes a matter of discretion for the court whether or not to grant leave to appeal out of time. The onus falls heavily on an intended appellant to convince the court to grant leave.
7. In **Herbert Construction Company ( Fiji ) Ltd v Fiji National Provident Fund** [2010] FJCA 3; Miscellaneous Case 020 of 2009 (3 February 2010) the court there stated:-

"It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal "

8. The above suggests that a party's right of appeal exists while time runs for the filing of the requisite appeal documents. Once time runs out it then becomes a matter of judicial discretion whether or not to grant leave to appeal out of time. Of course, that discretion must still be exercised judicially.



9. Mr. Justice Callanchini sitting as a single judge of the Supreme Court, reiterated the same principles in Naba v Tower Insurance (Fiji) Ltd [2011] FJSC 9; CBV0002.2011 (24 June 2011):

Principles

[7] The power to extend the time for an appeal is discretionary, and has to be exercised judicially, having regard to established principles. The following factors are usually considered when determining an application for an extension of time, namely (a) the length of the delay, (b) the reasons for the delay, (c) whether there is an arguable case on the appeal and (d) the degree of prejudice to the respondent if time is extended.

ANALYSIS

*Length of Delay & Reasons*

10. The appellant filed his summons in this court on 08 August 2013. The ruling of the Learned Magistrate had been delivered some three months earlier on 11 May 2013. To explain the delay, the appellant deposes as follows at paragraphs 3 to 13 of his affidavit. He says that a ruling of this matter was first handed down on 20 November 2012<sup>1</sup> which was received by his solicitor. The ruling was not in his favour. He then instructed his lawyer to file an appeal. It appears that his solicitor then filed an appeal at the High Court. However, the High Court then returned the appeal and advised the solicitor to file the same at the Magistrates Court Registry<sup>2</sup>. Apparently, on 28 February 2013, the solicitor filed the appeal at the Magistrates Court. However, he was only to be told that the ruling had yet to be delivered. This caused much confusion to the solicitor who had actually received a judgement on the matter earlier on 20 November 2012<sup>3</sup>.
11. His solicitor then left the matter at that and simply awaited the ruling. In due course, the solicitor would receive a NOAH from the Magistrates Court

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<sup>1</sup> He deposes:

...on 20<sup>th</sup> of November, 2012 a copy of ruling delivered on this matter was handed from the Nadi Magistrate Court by his worship Mr Ajmeer. Annexed herein and marked as exhibit "AP1" is a copy of such ruling.

<sup>2</sup> He deposes:

That once my solicitors received such ruling and found that judgment was not in my favour, I was called by my solicitor and advised on the outcome of the case. I then instructed my solicitors to file an appeal.

**That my application for appeal was returned by the High Court registry**, and my solicitors had been informed to file the application in the Magistrates Court.

<sup>3</sup> He deposes:

Once the application was filed in the Magistrate Court on 28<sup>th</sup> February 2013, my solicitors were informed that the judgment was not delivered. My solicitors disputed that it had already been delivered in Court by Magistrate Ajmeer on 20<sup>th</sup> November 2012 and copy was obtained.



Registry returnable 08 May 2013. However, on 08 May 2013, the ruling was further adjourned to 11 May 2013<sup>4</sup>.

12. On 11 May 2013, “a second ruling” was delivered. He says that his solicitor **“overlooked this matter to file the necessary document”** as a result of **“the confusion they had in regards to the two rulings”**<sup>5</sup>.
13. He deposes that he has genuine grounds of appeal. He asserts that the notice of intention to appeal was filed on time but was refused by the Magistrates Court Registry due to the pendency of the second ruling<sup>6</sup>.
14. Both the earlier and the latter ruling at issue in this case were written by the Learned Magistrate Qica. The findings and conclusions in both rulings were the same. The only difference are as follows:
  - (i) whereas in the first ruling, the Magistrate had awarded interest on the judgement sum at 10% p.a., he had reduced this to 5% in the second ruling.
  - (ii) the first thirteen paragraphs are the same verbatim. These are paragraphs which deal with the evidence taken at trial.
  - (iii) however, there are some slight differences from paragraphs 14 right through to the remainder of the ruling. These are the paragraphs wherein the Learned Magistrate was attempting a more in depth analysis and was expanding on his earlier ruling in terms of his evaluation of the evidence and fact.
15. It is hard to accept the applicant’s explanation. In spite of the first ruling, his solicitor was clearly anticipating the second ruling. He should have been on guard then because his point of reference in terms of time calculation should have been the date of the second ruling.

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<sup>4</sup> He deposes:

That I was informed by my solicitors and verily believe they received NOAH from the Magistrate Court that my matter would be called on the 8<sup>th</sup> of May, 2013 for ruling.

That my solicitor Mr. Maopa attended to this matter in Court on the 8<sup>th</sup> of May for ruling, however the matter was further adjourned to the 11<sup>th</sup> of May 2013.

<sup>5</sup> He deposes:

That on Saturday the 11<sup>th</sup> of May, 2013, a second ruling was delivered by his worship Mr. Qica. I annexed herein and marked as exhibit “AP 2” is a copy of such ruling.

That after the second ruling was given and as a result of the confusion they had in regards to the two rulings received, they overlooked this matter to file the necessary document.

<sup>6</sup> He deposes:

That I have genuine grounds of appeal. I annexed herein and marked as exhibit “AP 3” a draft copy on the grounds of appeal.

That I was informed by my solicitors and verily believe that the intention to appeal was filed in time but refused by the Court Registry due to the second ruling pending.

That I seek an order for leave to file the appeal application out of time.



16. Accordingly - it is hard to imagine how the fact of the earlier ruling could have led to his not filing the requisite appeal documents on time.
17. I would have been prepared to give the applicant the benefit of the doubt on account of this factor alone. However, I would not do the same on account of the other factors.

*Whether there is an Arguable Case on Appeal & Chances of Succeeding If Time Extended*

18. The issue in terms of the plaintiff's claim at the Magistrates Court was narrowly couched. It was based on the allegation that the defendant had wrongfully impounded a vehicle registration number Ea855 for eighty days and the claim was for special and general damages allegedly suffered as a result.
19. The defendant had pleaded that he had lent money to the plaintiff to buy the car. The plaintiff was to have paid him back in full with interest.
20. The learned Magistrate had recorded in his ruling that in cross-examination, the plaintiff could not establish that he had borrowed money from his wife's account. Nor was there any conclusive evidence that he had borrowed money from the defendant.
21. The evidence given for the defendant included two from police officers namely one Sgt Jaynendra Singh and Constable Jitendra Prasad who both gave evidence that the plaintiff had come to see them at the station to lodge a complaint about the defendant impounding the vehicle. The dispute was over the payment of the vehicle.
22. The latter had said in Court that the plaintiff had told him that the plaintiff had told him that he and the defendant had a mutual agreement and that he (plaintiff) had borrowed money from the defendant to buy the van. Both said they did not see any written agreement.
23. I have perused the proposed grounds of appeal. In my view, they are only to do with the credibility of witnesses. Although the applicant's counsel has applied some drafting skill to make it appear so, there is no issue raised about how the Learned Magistrate has applied or misapplied the law.
24. In **Langsam v Beachcroft LLP** [2012] EWCA Civ 1230, the Court said:



It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach. In other cases, where the finding turns on matters on which the appellate court is in the same position as the judge, the appellate court must in general make up its own mind as to the correctness of the judge's finding (see Datec Electronic Holdings v United Parcels Service [2007] UKHL 23, [2007] 4 All ER 765, [2007] 1 WLR 1325 at 46 per Lord Mance).

25. I observe that, at the trial before the learned Magistrate, the applicant only had two witnesses. He himself was the first of those two witnesses. The other one was his own son.
26. The defendant on the other hand had called five witnesses, including himself and the two police officers named above.
27. The defendant's third witness was one Rajendra Prasad, the motor mechanic from whom the car in question was bought by the plaintiff. Prasad confirmed that it was the defendant who gave him the money from which the vehicle was purchased.
28. I observe that according to the evidence of the plaintiff's own son, the defendant had impounded the vehicle when the plaintiff's son had taken the vehicle to the defendant's compound.
29. If one were to read between the lines of the Magistrates reasoning, he appeared to favour that the defendant, by virtue of his having financed the purchase of the vehicle in question, and considering the fact that the balance of the money owed to him was outstanding, had an equitable interest in the vehicle which gave him a right to impound it when it was brought to his home.

*Degree of Prejudice to Respondent if Application is Granted*

30. This court is ill placed to re-evaluate the findings of fact by the Learned Magistrate or to reassess the credibility of the witnesses. On the balance of prejudice, I am of the view that the defendant will be more greatly prejudiced of the two.

**CONCLUSION**

31. In the final, I dismiss the application. Costs to the respondent which I summarily assess at \$500-00 (five hundred dollars only).



.....  
Anare Tuilevuka

**JUDGE**

11 May 2016