

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action HBM 147 of 2014

BETWEEN : **JAN'S RENTAL CARS (FIJI) LIMITED** trading as 'Budget Rent A Car of Fiji', a limited liability company having its registered office at 366 Grantham Road, Suva, Fiji.

APPLICANT/APPELLANT
(Original First Defendant)

A N D : **PREMA NAND** of Naqere, Savusavu, Carrier

FIRST RESPONDENT
(Original Plaintiff)

A N D : **ROGER LUTZ** of California, United States of America

SECOND RESPONDENT
(Original Second Defendant)

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Ms. S. Devan for the Applicant
Mr. V. Prasad for the First Respondent
Mr. K. Jamnadas for the Second Respondent

DATE OF JUDGMENT: 27 January, 2016

RULING

**(Application For Leave To Extend Time To File Notice Of Intention
To Appeal and Grounds of Appeal)**

1.0 Introduction

1.1 On 27 October 2014, the Applicant filed an Application by Summons seeking following Orders:

- “(i) That the time within which a Notice Intention to Appeal and Grounds of Appeal are to be filed be extended and the Applicant/Appellant do have leave and be at liberty to lodge an Appeal against the decision of the Honourable Magistrate Mr. Chaitanya Lakshman delivered on the 25 June 2014 whereby a judgment of \$29,156-00 was entered against the Applicant/Appellant.**
- (ii) An Order that the execution of the Judgment of 25 June 2014 and all proceedings thereunder be stayed until the determination of the Applicant’s/Appellant’s application herein.**
- (iii) Costs of the within application be in the cause.**
- (iv) Such further and/or other reliefs or orders that this Honourable Court deems just an expedient.”**

(“the Application”)

1.2 On 25 November 2014, parties were directed to file Affidavits and Submissions and the Application was adjourned to 17 February 2015 for hearing.

1.3 On 17 February 2015, Counsel for Applicant and First Respondent informed the Court that they rely on the Submissions filed in Court whilst counsel for the Second Respondent confirmed to the Court that Second Respondent has no interest in the Application as he has filed his Appeal within prescribed time.

1.4 Following Affidavits were filed by Applicant and First Respondent:-

For Applicant

- (i) Affidavit of Nilesh Sharma in Support sworn and filed on 27 October 2014 (**“Nilesh’s 1st Affidavit”**);
- (ii) Affidavit of Nilesh Sharma in Reply to First Respondent’s Affidavit in Opposition sworn on 30 January 2015 (**“Nilesh’s 2nd Affidavit”**).

For First Respondent

Affidavit in Opposition of First Respondent sworn on 23 December 2014 (**“First Respondent’s Affidavit”**)

2.0 Background Facts

- 2.1 In 2013 the First Respondent filed claim against the Applicant as Owner of motor vehicle registration No. LR 990 and Second Respondent as Driver of the said vehicle in respect to an accident involving said motor vehicle registration No. LR 990 and First Respondent’s motor vehicle registration No. RSL 365.
- 2.2 On 25 June 2014, the Learned Magistrate delivered his Judgment awarding First Respondent \$29,156.00 in damages (including costs) plus interest at the rate of 6.5% from date of Judgment.
- 2.3 On 7 July 2014, Applicant filed Notice of Motion in Magistrates Court seeking following orders:-

“1. An order that the time within a notice of intention to appeal and grounds or appeal are to be filed be extended and the 1st Defendant do have leave and be at liberty to lodge an appeal against the decision of this Court.

2. An order that the execution of the judgment of 25th June 2014 and all proceedings thereunder be stayed until the determination of this application.

3. Costs be in cause.

4. Such further orders as the Court deems just and expedient.”

- 2.4 The Learned Magistrate relying on what was said by his Lordship Justice Pathik (as he then was) in ***Crest Chicken Ltd v Central Enterprise Ltd*** [2005] FJHC 87: HBA 0013; 2003 s (19 April 2005) made following orders:-

“a) The notice of intention to appeal is out of time.

b) The Court has no jurisdiction to extend the time.

c) Notice of motion seeking the listed orders dated 11th July 2014 is hereby dismissed.

d) Cost of this application is summarily assessed as \$200.00 which is to be paid by the First Defendant to each other party within 7 days.”

(“the Ruling”)

3.0 The Application

3.1 Two issues that needs to be determined in this matter are:-

- (i) Whether the Magistrates Court or this Court has jurisdiction/discretion to extend time to file notice of intention to appeal.
- (ii) If this Court does have jurisdiction/discretion to extend time to file notice of intention to appeal then whether this court should grant Applicant leave to file notice of intention of appeal and grounds of appeal out of prescribed time.

Whether the Magistrates Court or this Court has jurisdiction/discretion to extend time to file notice of intention to appeal

3.2 I have analysed the rules and cases that deal with this issue in my ruling delivered on 14 January 2016 in **Katafono v. Brown** unreported Civil Action No. HBC 135 of 2014.

3.3 It is appropriate that relevant paragraphs that deal with this issue in **Katafono’s** case be re-produced here.

3.4 The relevant paragraphs in **Katafono’s** case are as follows:

“2.4 Order 37 Rule 1 of the Magistrate Court Rules provide:-

“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.”

2.5 In Crest Chicken (supra) his Lordship Justice Pathik (as he then was) in respect to the rule stated as follows:-

“This is a mandatory rule and it does not give the Magistrate power to extend time. Even if he had, no application was made by the appellant for extension of it was already late in filing of giving Notice of Intention to appeal within the seven days after judgment was pronounced.

Had the legislature intended it could have specifically provided for application to extend time. It did not do so in Or. 37 R. 1 but Or.37 R.4 which provides as follows, gave the Magistrate’s Court power to extend time to file grounds of appeal.”

4. On the appeal failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.”

On the “appeal failing to file” in first line of Rule 4 should read “On the appellant failing to file ...”

2.6 His Lordship further went on to state that:-

“In Or. XXXVII r.1 there is no provision for extension of time to give Notice of Intention to Appeal, although there is power to extend to file Grounds of Appeal under Or.37 r.4.”

2.7 His Lordship held that the Magistrates Court or High Court does not have jurisdiction to extend time for filing of Notice of Intention to Appeal.

2.8 In Nand v. Famous Pacific Shopping (NZ) Limited (2010) FJHC 619; Civil Appeal No. 6 of 2009 the Court dealt with the Application to extend time to file notice of intention to appeal and the grounds of appeal under Section 39 of Magistrates Court Act.

The Court in respect to application to extend time to file notice of intention to appeal stated as follows:

“In determining whether it should exercise its discretion to allow the Appellant to file and serve a Notice of intention to appeal out of time, the court considers four matters. They are (a) the length of the delay, (b) the reasons for the delay, (c) the merits of the proposed defence and (d) any prejudice likely to result to the Respondent.”

2.9 In Narayan v. Kumar (2014) FJAC 187, HBA 34.2011 (20 March 2014) his Lordship Justice Amaratunga followed the decision in Crest Chicken.

2.10 In Fiji Posts and Telecommunications Ltd v. Suey Loo Keen HBA 003 of 2000L (21 March 2014) her Ladyship Madam Justice Wati held that time to file notice of intention to appeal can be extended under Order 2 Rule 2 of the Magistrates Court Rules. Order 2 Rule 2 of Magistrates Court Rules provide as follows:-

“Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the court for an order to effect the object sought to have obtained with the consent of the other party, and such order may be made although the application for the order is not made until the expiration of the time allowed or appointed”.

The Court stated as follows:-

“I find that even if there is no specific power given under the said rule which prescribes the time to file the notice of intention to appeal, there is nothing in the words of Order II Rule 2 which can preclude the Court from using that rule to consider an application for extension of time to file notice of intention to appeal provided that the applicant first makes an attempt to secure consent of the other parties for doing of the act for which the application has been made in Court. In absence of a specific provision, the Court can go to the general provision to consider the application for extension of time.”

2.11 In Tausere v. Clayton [2015] FJHC 902; HBM 141.2014 (18 November 2015) the most recent decision on this issue his Lordship Justice Seneviratne followed Crest Chicken and held that Court does not have power to extend time to file Notice of Intention to Appeal once the time has expired.

2.12 His Lordship stated as follows:-

“It is difficult to understand what the learned counsel meant by saying that they were within 7 days allocated by the above provisions. This cannot be an application for the enlargement of time to file notice of intention to appeal. If it is so the application must fail in limine for the reason that the Court has no power to extent the time period allocated to file notice of intention to appeal.”

2.13 Nands case dealt with the application for leave to file notice of intention to appeal and grounds of appeal out of time and dealt with the application under section 39 of Magistrates Court Act.

2.14 In Post and Telecommunication case time for filing of notice of intention to appeal and grounds of appeal was extended pursuant to Order 2 Rule 2 of the Magistrate Court Rules.

2.15 I will now look at relevant provision of Magistrate Court Rules and Magistrate Court Act that deal with Civil appeals.

2.16 The relevant rules of Magistrates Court Rules for the purpose of the issue before this Court are Order 37 Rules 1, 3 and 4. However, I will also mention Order 37 Rule 2.

2.17 The above rule requires the appellant to do the following:-

- (i) Rule 1 requires appellant to give notice of intention to appeal in writing to Court and Respondent within seven (7) days after the date decision is given;
- (ii) Rule 2 gives Magistrates Court discretion to Order appellant to provide security for costs;
- (iii) Rule 3 requires appellant to file in Magistrates Court and serve grounds of appeal within one month from the date decision is given by Magistrates Court;

(iv) Rule 4 states that if appellant fails to comply with Rule 3 then it shall be deemed that appellant has abandoned the appeal, unless Magistrates Court or High Court shall see fit to extend time for filing grounds of appeal.

2.18 Section 38 of Magistrates Court Act provide as follows:-

“38. Subject to the provision of Section 39, the High Court shall not entertain any appeal unless the appellant has fulfilled all the conditions of appeal imposed by the magistrates’ court or by the Supreme Court, as prescribed by rules of Court” (emphasis added)

2.19 Under section 38 appeal will be entertained if appellant gives notice of intention to appeal, files grounds of appeal within the prescribed time and give security for costs if ordered by Magistrates Court.

2.20 Section 39 of the Magistrates Court Act provides as follows:-

“39. Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a magistrates’ court, on any terms which it thinks just.” (emphasis added)

2.21 Section 39 has been used to extend time for filing of Notice of Intention to Appeal and Grounds of Appeal.

2.22 My view on section 39 is that it does not give power to Magistrates Court or High Court to extend time for filing of notice of intention to appeal or grounds of appeal but gives the High Court discretion to “entertain any appeal from Magistrates Court, on any terms which it thinks just” when the Appellant has failed to comply with rules of Magistrates Court in relation to civil appeal.

2.23 For instance where the appellant files notice and grounds of appeal without giving notice of intention to appeal within the prescribed time the High Court may hear the appeal “on terms which it thinks just”.

2.24 Order 2 Rule 2 of the Magistrates Court Rules that was applied in Post and Telecommunications case does not apply here as there is no evidence that Applicant sought consent of Respondent.

2.25 I note that in the cases listed at paragraphs 2.6 to 2.11 of this ruling the Counsel for the Appellants made no reference to Order 3 Rule 9 of the Magistrates Court Rules which provide as follows:

“A court or a judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these Rules or by any direction or order of the court or a judge the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the court or a judge shall otherwise order.” (emphasis added)

2.26 Court is defined as “Magistrates Court established under Magistrates Court Act” in section 2 of the Magistrates Court Act.

2.27 It has to be noted that Order 3 Rule 9 does not relate to filing of any specific document or doing of any specific act as the heading for Order 3 is “Miscellaneous Provision”.

2.28 Therefore Order 3 Rule 9 is applicable to all the provision of the Magistrates Court Rules that require parties to do any act or for taking any proceedings within prescribed time.

2.29 Filing of Notice of Intention to Appeal within the prescribed time is an act that is required to be done by the Appellant and if Appellant fails to do such act then the Magistrates Court or the High Court has unfettered discretion to extend time for appellant to do such an act.

2.30 Finally this Court is of the view that:-

(i) Section 39 of the Magistrates Court Act does not give this Court discretion to extend time for filing of notice of intention to appeal or grounds of appeal but gives this Court power to deal with the appeal before the Court on terms

which it thinks just even though appellant has not complied with rules in respect to Civil Appeal (ss38 and 39 of Magistrates Court Act);

- (ii) This Court and Magistrates Court has jurisdiction/discretion to extend time for filing of notice of intention to appeal and grounds of appeal under Order 3 Rule 9 of the Magistrates Court Rules, even if Application to enlarge time is made after prescribed time has expired.**

This view has some support from what was said in Isikeli Maravu Tuituku & Anor. v. Isikeli Tuituki & Ors, Family Court Appeal No. 1 of 2014 (7 December 2014) (Wati J).”

- 3.5 Hence I hold that Magistrates Court has jurisdiction/discretion to extend time to file Notice of Intention to Appeal.
- 3.6 Even though Applicant has not appealed the Ruling but filed concurrent Application I see it fit to set aside the Orders made by the Learned Magistrate in his Ruling delivered on 21 October 2014 including order for Applicant to pay costs.

Whether Leave should be granted to Applicant to file Notice of Intention to Appeal and Grounds of Appeal.

- 3.7 It is well established that in order to do justice the court needs to consider following factors in dealing with application to extend time fixed by Rule of Court or Order of the Court:-
- (i) Length of delay.
 - (ii) Reason for delay.
 - (iii) Merits of the Appeal.
 - (iv) Prejudice to the Respondent

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; **Nand v. Famous Pacific Shopping (NZ) Limited (2010)** FJHC 619; Civil Appeal No. 6 of 2009.

Length of Delay

3.8 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 matter 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 as 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.

3.9 Judgment in Magistrates Court was delivered on 25 June 2014.

3.10 Pursuant to Order 37 Rule 1 of Magistrates Court Rule, Notice of intention to Appeal should have been filed by 2 July 2014.

3.11 As stated at paragraph 4 of the Ruling the Applicant took the Notice of Intention to Appeal to Magistrates Court registry for filing when at the direction of the Learned Magistrate the registry refused to accept the Notice as the Applicant was out of time by two days.

3.12 On 7 July 2014 (lapse of 5 days) Applicant filed application for extension of time to file notice of intention to appeal.

3.13 The Ruling in respect of the above application was delivered on 21 October 2014.

3.14 On 27 October 2014, Applicant filed the Application in this Court.

3.15 It is obvious that delay has not been inordinate in that Applicant filed application for extension of time to file notice of intention to appeal five (5) days after the prescribed time had expired.

Reason for delay

3.16 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).

- 3.17 Application was refused in **Revici's** case as no explanation for delay was given.
- 3.18 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.”

- 3.19 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 filed 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.”

- 3.20 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.

3.21 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**]

3.22 Even though delay has not been inordinate Applicant needs to provide satisfactory reason for the delay.

3.23 The reasons stated as paragraph 5 to 11 of Nilesh's 1st Affidavit in short are:-

- (i) On 26 June 2014, Judgment was sent by e-mail by Applicant's Solicitor to Applicant with advise that Judgment should be appealed;
- (ii) Due to some problem with Solicitors e-mail server e-mail was re-sent on 27 July 2014;
- (iii) On 2 July 2014 Solicitors sent further e-mail seeking instructions;
- (iv) Instructions to appeal was received on 4 July 2014;
- (v) On 4 July 2014 Applicant attempted to file Notice of Intention to Appeal which was not accepted by Court registry;
- (vi) Applicant's Solicitor though was under misapprehension that 'Saturday' and 'Sunday' are excluded from seven day's fixed under Order 37 Rule 1

3.24 Whilst this court has time and again stated that Solicitors misunderstanding as to when time for appeal starts to run or how time fixed by rules is to be calculated is not satisfactory reasons I find that the reasons for delay in its entirety is not unsatisfactory.

Merits of Appeal

3.25 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.”

3.26 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.”

3.27 From the proposed grounds of appeal it can be noted that gist of Applicant’s proposed grounds of appeal is that the Learned Magistrate wrongfully held that the Second Respondent was driving motor vehicle registration No. LR 990 as agent of the Applicant at the time of accident and that he failed to give any consideration to or distinguish the principle in **Michael Ban v Jan’s Rental Car’s (Fiji) Limited** (1992) 38 FLR 158.

3.28 In **Michael Ban’s** case Plaintiff sued the rental car company in respect to injuries he sustained as a result of accident involving motor vehicle rented out by the rental company to a third party. The third party was driving the vehicle at the time of the accident. His Lordship Justice Scott (as he then was) stated as follows:-

“As I see it, the basic question is whether the mere fact that Groot hired the car from the Defendant can give rise to the Defendant’s liability. In my view it cannot. In his discussion of

liability for torts committed by an agent the learned author of *Bowstead on Agency* makes no mention of any rule that a hiring company is liable in the way being suggested. On the contrary, under the heading “Casual Delegation” (15th edition page 393) a large number of cases are cited which tend to establish just the opposite and it is said “there is no question of liability where A is merely driving with B’s permission for a purpose of his own in which B has no interest.” In the present case the Defendant’s business was to rent cars but in my view that does not mean that each hirer is going about the Defendant’s business. If the Defendant has asked Groot to perform some small service for him on his way to Sigatoka such as dropping off a packet to a friend of the Defendant and had an accident occurred while the packet was being dropped off then perhaps it could be argued that at that time Groot was driving on the Defendant’s business. In my view the first submission made by Mr. Maharaj and already quoted is fallacious. Either a person is driving on the rental car hirer’s business or he is driving for a pleasure purpose not both. That the defendant may have had an interest in seeing his hire car safely returned to him by the hirer did not, in my view, mean that he had an interest in legal terms in the hirer’s driving. I agree with Mr. Singh that the evidence also quite clearly shows that the reason that Groot was driving the car was that he had rented it for pleasure purpose of his own. He had paid to rent the car.”

- 3.29 The principle in **Michael Ban’s** case is that hirer of rental car does not drive the car as agent or servant of the rental company and the rental company therefore is not vicariously liable for that drivers negligence except where the accident took place whilst the hirer was carrying out any act for and on behalf of the rental company.
- 3.30 **Michael Ban’s** case was binding on the Learned Magistrate and if the Learned Magistrates was of the view that facts of this case is distinguishable from **Michael Ban’s** case then he should have clearly stated that in the Judgment.
- 3.31 I note that the Learned Magistrates relied on the oral evidence of Second Respondent that the rental agreement provided for two way insurance cover.

There is no evidence of the rental agreement being produced to Court as evidence to support Second Respondent's evidence in this regard.

3.32 The other proposed grounds of appeal is that the Learned Magistrate disallowed Applicant's witness to tender the Rental Agreement when Second Respondent gave oral evidence in respect to the Rental Agreement.

3.33 There is nothing in the Learned Magistrates Judgment about tendering of Rental Agreement by Applicant's witness and this Court does not have the copy record or Magistrate Courts file to determine the ground on which tendering of Rental Agreement as evidence was not allowed by the Learned Magistrate.

3.34 Hence, this Court is not in a position to make any comments on this ground.

3.35 I am of the view that the Applicant's proposed grounds of appeal has some merits which needs to be fully heard by this court.

Prejudice to the Respondent

3.36 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.”

3.37 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.”

3.38 It is not doubted that a successful litigant is entitled to fruits of litigation without undue delay.

3.39 In this case First Respondent at paragraph 9 of First Respondent's Affidavit say as follows:

“... I am severely prejudiced by the defendants’ failure to satisfy the judgment of the Court who since the accident on 27 September 2011 have evaded compensating me for the damages and losses I have suffered.”

- 3.40 The Applicant will only be liable if Applicant is held to be vicariously liable for Second Respondent’s negligence.
- 3.41 Second Respondent has appealed against the Judgment of the Learned Magistrate and if Second Respondent is successful in his appeal then Applicant will not be liable as well even if it is found that Second Respondent have been driving the hired vehicle as agent or servant of the Applicant at the time of accident.
- 3.42 Every litigant has a right of appeal and given the fact that Applicant’s delay in filing application for enlargement of time was not inordinate, and Second Respondent appeal is on foot I cannot see First Respondent suffering any serious prejudice.
- 3.43 I have also taken into consideration that since filing of Application to extend time in Magistrates Court the Applicant has complied with all directions of the Court in respect to filing of Affidavits and Submissions without delay.
- 3.44 Having found that delay is not inordinate; the reason for delay is not entirely unsatisfactory; the proposed ground of appeal has some merits and need to be heard by this Court; and First Respondent will not suffer prejudice the Applicant is granted leave to file Notice of Intention to Appeal and Grounds of Appeal out of time.

Costs

- 3.45 As for cost the Applicant should pay the Cost for Application to extend time as stated in Order 3 Rules 9 of the Magistrate Court Rules.

4.0 Conclusion

- 4.1 I make following declaration orders;
- (i) Learned Magistrates Ruling delivered on 21 October 2014 in Suva Magistrates Court Civil Action No. 94 of 2013 is set aside;

- (ii) Applicant is to file and serve Notice of intention to Appeal and Notice and Grounds of Appeal by 11 February 2016 in respect to Learned Magistrates Judgment delivered on 25 June 2014 in Suva Magistrates Court Civil Action No. 94 of 2013;
- (iii) Execution of Judgment delivered on 25 June 2014, in Suva Magistrates Court Civil Action No. 94 of 2013 be stayed pending determination of the Appeal by the Applicant;
- (iv) Applicant to pay First Respondent cost of this action assessed in the sum of \$800.00 by 5 February 2016.



At Suva
27 January 2016

Neel Shivam Lawyers for the Applicant
VP Lawyers for the First Respondent
Jamnadas & Associates for the Second Respondent