

**THE HIGH COURT OF FIJI AT SUVA  
CIVIL JURISDICTION**

**HBM NO. 29/2015**

BETWEEN:

Simon Seru

Appellant

AND

Credit Corporation (Fiji) Limited

Respondent

COUNSEL: Ms P. Salele for the appellant  
Mr Ritesh Naidu for the respondent

Date of hearing: 22<sup>nd</sup> September, 2015

Date of Judgment: 29<sup>th</sup> August, 2016

**Judgment**

1. The appellant moves for leave for enlargement of time to appeal a judgment of the Magistrate's Court. The application is supported by an affidavit in support, the contents of which I will refer to later in my judgment.
2. The question for determination in this application is whether the time limit for filing notice of intention to appeal under Order 37, Rule 1 of the Magistrates Courts Rules, may be extended.
3. Order 37, Rule 1, provides that :

*Every appellant shall within 7 days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision 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:*

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

4. Order 37 Rule 3, requires an appellant within one month from the date of the decision appealed from, including the day of such date, to file grounds of appeal and serve a copy on the respondent.
5. An appeal is deemed to be abandoned under Order 37 Rule 4, if the appellant fails to file the grounds of appeal within the prescribed time, “*unless the court below or the appellate court shall see fit to extend the time*”.
6. In *Crest Chicken Limited vs Central Enterprises Limited and Another*, [2005] FJHC 87; HBA 0013 of 2003, Pathik J held that Or 37, r 1 does not give the Magistrate power to extend time to file the notice of intention to appeal. Pathik J citing several decisions of the English courts that rules of court must be obeyed concluded that:

*.the appeal before the Court is invalid for non-compliance with the mandatory provisions of Or. 37 r.1 of the Magistrate's Courts Rules. There was never at any time an application to apply for extension of time to give Notice of Intention to Appeal out of time or to file Grounds of Appeal. This was a sine qua non to enable the learned Magistrate to consider the stay application herein.*

7. In *Loks Crane and Contractors Ltd v Clutch Systems(Fiji) Ltd*, (HBM 0031 of 1999) the defendant had sought an enlargement of time to file grounds of appeal pursuant to Or 37, r4. Gates J(as he then was) held that section 39 provides for the exercise of discretionary powers of the High Court “*to entertain any appeal from a Magistrate's Court on any terms which it thinks just*”. His Lordship declined the application on a consideration of the following five factors as identified in *AG & Ano vs Paul Praveen Sharma*, (Civil App. no.ABU0041/93S)
  - i. *The reason for the failure to comply.*
  - ii. *The length of the delay.*
  - iii. *Is there a question which justifies serious consideration?*
  - iv. *If there has been substantial delay, have any of the grounds such merit that they will probably succeed?*
  - v. *The degree of prejudice to the Respondent in enlarging time.*

8. In *Kirpa Nand v Famous Pacific Shipping (NZ)Ltd*, (Civil Appeal no 6 of 2009) Calanchini J (as he then was) said:

*However, the rule refers only to extending time for the filing of grounds of appeal and does not deal with extensions for appeals where no notice of intention has been given. It may be that Section 39 of the Magistrate's Court Act, in an appropriate case provides the necessary jurisdiction for this Court to entertain a civil appeal from the Magistrates' Court notwithstanding that no notice of intention to appeal has been given, filed or served. (See *Loks Crane and Contractors Limited –vs- Clutch Systems (Fiji) Limited* unreported Civil Appeal 31 of 1999 Lautoka delivered 17 July 2002 per Gates J(as he then was).(emphasis added)*

9. More recently, Kamal Kumar J reviewed all the above authorities in *Jan's Rental Cars (Fiji)Ltd and Prema Nand v Roger Lutz*,(Civil Action HBM 147 of 2014) and concluded as follows;

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

10. The principle that may be deduced from the cases I have cited is that while Or 37, r 1 is mandatory as to the time period within which notice of intention to appeal is required to be filed, Or 39 gives the High Court the discretion to entertain an appeal, if it thinks just on a consideration of the five factors identified for consideration in belated applications.

*The reason for the failure to comply*

11. Raijeli Lavelawa, a law clerk of Salele Law, solicitors for the appellants, in her affidavit in support of the motion for enlargement to appeal out of time states that the appellant instructed them to file appeal by his email of 19 December, 2014.

12. The affidavit fails to explain in the first instance, why notice of intention to appeal was not filed within 7 days of the judgment of 9<sup>th</sup> December, 2014.
13. The affidavit continues to state that the appeal was *'lodged (5 days later) on 24<sup>th</sup> December, 2014 within 21 days of the judgment.'* No explanation is provided for that delay.
14. Next, the affidavit in support states that about *"the second week of January, 2015 (she) was informed verbally by the Civil Registry Magistrate's Court, Suva that we should file our application to appeal out of time even though the delay was caused by the Registry"*.
15. On 14<sup>th</sup> January, 2015, Salele Law then write to the Chief Registrar stating that the appeal was filed on 24<sup>th</sup> December, 2015, and *"the delay was committed by the Magistrate's court holding or checking the papers from 24/12/14 to 8/01/15"*.
16. On 10<sup>th</sup> February, 2015, a Senior Court Officer, in reply, advised Salele Law to apply for leave to appeal.
17. This application is then filed on 24<sup>th</sup> February, 2015.
18. Ms Salele, counsel for the appellant has in her written submissions has cited the case of *Gatti vs Shoosmith*, (1939) 3 All ER 916. In that case Sir Wilfred Greene, M.R. at pg 919 said that *"..under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be", because it is not to be thought that it will necessarily be exercised in every set of facts.*
19. I proceed to consider the other factors.

*The length of the delay.*

20. In *Tevita Fa vs Tradewinds Marine Ltd and Oceanic Developers (Fiji) Ltd*, (Civil Appeal No. ABU 0040 of 1994) the application for leave to appeal was filed 4 days after the end of the period of six weeks. Thompson said.

*That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only four days requires satisfactory explanation before an extension of time can properly be granted.*

21. In *Aaryan Enterprise vs Mehak Unique Fashion*, Civil Appeal No. 17 of 2011 (10 November 2011) Calanchini (as he then was) said that a delay of lay of 19 days was extensive.

22. In *The Queen v Brown*,(1963) SASR 190 at 191 as cited by Chief Justice Gates in *Kamalesh Kumar and Mesake Sinu v The State*, (Criminal Appeal Nos CAV000/09 and 0001/10) the Court said:

*In the cases cited the delay ranged from a little over a month (in R. vs Rhodes) to more than three months (in R vs Cullum). In R vs Marsh, where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the Court is satisfied that there are such merits that the appeal will probably succeed.*

23. The present application was filed on 24 February 2015, which was a delay of almost 71 days.

*Is there a question which justifies serious consideration?*

*If there has been substantial delay, have any of the grounds such merit that they will probably succeed?*

24. Under these heads, I will consider the likelihood of success in the appeal.

25. The proposed grounds of appeal of the appellant read:

1. *Her Worship erred in law and in fact in refusing to grant an adjournment to the Defendant who was unemployed and had valid reasons for not being present for the hearing.*
2. *Her Worship erred in law and in fact in accepting the Plaintiff's oral evidence that there was an error on the part of the Plaintiff to put the date on the last page of the Bill of Sale as 24<sup>th</sup> January, 2005 when the date on the document was 24<sup>th</sup> January, 2006 the date on which it was registered as the document speaks of itself.*

26. The first ground takes issue with the Learned Magistrate refusing to grant an adjournment.
27. The judgment of the lower court provides that on 4<sup>th</sup> December, 2013, the hearing in this matter was fixed for 25<sup>th</sup> November, 2014.
28. An application to vacate the hearing date was made on 21<sup>st</sup> November, 2014, to permit the defendant to give evidence by video link. The judgment states that the application was declined on the ground that it was made "*at a time so close to the hearing date and no proper arrangements and information had been made and given by the Defendant to give evidence via video link*".
29. The second application to vacate the hearing date to allow the defendant to travel from Australia in 2015, was declined, as the application was made on the hearing date.
30. In my view, the Learned Magistrate has, exercised her discretion correctly in declining the adjournments sought.
31. I refer to the following passage from the judgment of the FCA in *Goldenwest Enterprises Ltd v Pautogo*, [2008] FJCCA 3; ABU0038.2005:
- It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court's exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason.*
32. The second proposed ground of appeal argues that the lower court erred in accepting the plaintiff's evidence that there was an error "*on the part of the plaintiff to put the date on the last page of the Bill of Sale as 24<sup>th</sup> January, 2005, when the date on the document was 24<sup>th</sup> January, 2006 the date on which it was registered as the document speaks of itself.*"

33. In my view, Learned Magistrate quite correctly accepted the evidence given by the plaintiff's witness, since the appellant's counsel did not cross-examine that witness, as noted in the judgment of the lower court.

34. I do not find merits in the proposed grounds of appeal..

*The degree of prejudice to the Respondent in enlarging time.*

35. On the issue of prejudice, the General Manager of the respondent company, in his affidavit in answer states:

*The plaintiff will suffer prejudice if the time for appeal is extended. The plaintiff's claim was for recovery of its debt in respect of loan facility provided to the defendant in 2006. This claim was filed in July 2012.*

*The plaintiff obtained an order on formal proof against the defendant on 07 May 2013 which was set aside in November 2013. On 24 November 2014 the defendant filed an application for adjournment which was refused. The plaintiff's claim was finally heard on 25 November 2014. Any further delay will keep the plaintiff out of funds for longer.*

36. Mr Naidu submits that the writ was filed on 11<sup>th</sup> July, 2012. The respondent is a financial institution and needs to quickly recover its debt.

37. Sheppard JA in the *The Official Receiver vs Petrie Limited*, Civil Appeal No. ABU0049 of 1997 stated that "Any delay to a successful party receiving the fruits of a Judgment is, of course, prejudicial".

38. In my view, the respondent would suffer prejudice for the reasons stated in the affidavit filed on behalf of the respondent, if the appellant is granted enlargement of time.

39. I am satisfied that in all the circumstances, the interests of justice require me to decline the application for leave for enlargement of time to appeal.

**38. Orders**

- i) The application for leave for enlargement of time to appeal is declined.
- ii) The appellant shall pay the respondent a sum of \$1,000.00 as costs summarily assessed.



*A. L. B. Brito-Mutunayagam*

**A. L. B. Brito-Mutunayagam  
JUDGE**

29<sup>th</sup> August, 2016