

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBA APPEAL NO. 11 OF 2017

BETWEEN : **AUTOWORLD TRADING (FIJI) LIMITED** a limited liability company
having its registered office at Suva, Fiji.

1ST APPELLANT/APPLICANT

AND : **RAVINDRA LAL** of Viria Road, Vatuwaqa, Suva, Fiji, Businessman.

2ND APPELLANT/APPLICANT

AND : **ESALA MAU RAIDRUTA** t/a **KULA MATAGI** of PO Box 214, Suva,
Businessman

RESPONDENT

Counsel : **Mr. Shelvin Singh for the Applicant**
Mr. V. Filipe for Respondent
Date of Hearing : **26th May, 2017**
Date of Judgment : **2nd June, 2017**

JUDGMENT

INTRODUCTION

1. The Applicant-Defendant (who is referred as Appellant/Applicant in the Originating Summons) seeks leave to file Notice of Intention of Appeal out of time against a decision of a court below delivered on 29th December, 2016. Apart from that the Applicant-Defendant (Defendant) is also seeking leave to file Grounds of Appeal out of time and also stay of the learned Magistrate's decision. The Respondent- Plaintiff (the Plaintiff) in the court below had obtained judgment in his favour, after a hearing where both parties had led oral evidence.

ANALYSIS

2. Order XXXVII rule 1 of the Magistrates' Court states as follows;

'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 givennotice in writing of his intention to appeal.

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

3. The decision of the learned Magistrate was delivered on 29th December, 2016 and there was no issue of verbal notice in terms of the above provision as the Applicant did not appear in court at the time of the hearing.
4. The Applicant was represented by a legal practitioner at the hearing in court below and responsibility lies with the lawyer to make such appearance and also to make necessary steps for an appeal subject to the instructions of the Applicant.
5. Order III Rule 9 of the Magistrates' Court Rules states 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 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.'

6. In *One Hundred Sands Ltd v TeArawa Ltd* [2015] FJHC 487; HBC112.2014 (30 June 2015) Alfred J in the High Court, had quoted following passage from *Ratnam vs.*

Cumarasamy and Another [1964] 3 All E.R. at page 935; (Lord Guest in giving the opinion of the Board to the Head of Malaysia s)

"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 is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle." (emphasis is mine)

7. His Lordship Alfred J in High Court, had used this judgment to refuse an extension of time for leave to appeal against an interlocutory decision and His Lordship Ajmeer J in High Court, had also used the said quote to refuse a similar application for extension time for leave to appeal against a Master's decision, in Mohammed v Khan 2015 FJHC 728; HBC67.2014 (2 October 2015). This is not a quote that reject extension of time for a rule, for whatever reason. What is more important is the reasons alleged in the affidavit for extension. If such reasons lacked merit no extension can be granted.
8. The decision of the Magistrate was delivered on 29th December, 2017. Present application for extension was filed on 18th April, 2017. Before this application another application was made for extension of time for 'leave to appeal' on 13th February, 2017 which was dismissed on 21st March, 2017. If one exclude the time period for the dismissed application still there are two significant time periods of delay. First there was a delay of more than 45 day delay from 29th December, 2016 to date of institution of the previous action. (i.e 13th February, 2017). There is no satisfactory explanation for that delay. The Applicant state that neither he nor his solicitor were informed of the judgment. This is not a satisfactory reason. When the case was concluded a date was given for judgment and it was postponed

to 29th December, 2016. Any diligent party would not have to wait for such a long time to find out the plight of his case. This show lack of enthusiasm by the Applicant.

9. The matter that was filed for 'extension of time for leave to appeal' was dismissed without considering merits due to technical objection raised by the Respondent and this decision was delivered on 21st March, 2017. Since then more than 27 days had taken for the Applicant to file this application seeking extension time for Notice of Intention to Appeal. No reason given for such delay. Since the previous application was dismissed the present application could be made without further delay, which the Applicant was unable to do. 27 days delay is considerable considering that time given for Notice of Intention to Appeal was only 7 days.
10. Fiji Court of Appeal in *Apostle Gospel Outreach Fellowship International V Fiji Development Bank* (Unreported)(decided on 13thMarch, 2015) Calanchini P held if the explanation for the delay is not satisfactory the delay can be described as 'inordinate'. President of the Court of Appeal of Fiji, further added that since the delay is inordinate there should be more than a reasonable chance of succeeding in the Appeal to grant an extension of time.
11. Hirst LJ in *Finnegan v Parkside Health Authority* [1998] 1 All ER 595 discussed discretion granted in Supreme Court Rules of UK. It should be borne in mind that failure to comply with procedural provisions before a judgment and after a judgment are not the same. After a judgment is delivered, for whatever its worth, there is a determination by a judicial body and, fruits of success should not be denied or delayed unless there are good reasons for doing so.
12. Any irregularity or non-compliance after judgment is not as same as any irregularity or non-compliance before judgment. If a party is keen to Appeal after conclusion of the case it should have done without delay as there was already an order against such appellant. This may not be the case when it relate to a decision other than final determination. So, in order to grant an extension of time period for Notice of Intension to Appeal would require

higher threshold, than what would be required prior to the judgment. The Respondent who had obtained the judgment after spending time and money need not be delayed fruits of his judgment unless the Applicant had established factors for extension for time period on higher threshold.

13. Fiji Court of Appeal decisions of Fiji Court of Appeal decision (Gunaratne JA) in *Clark v Zip Fiji* [2014] FJCA 189; ABU0003.2014 (5 December 2014). *Singh v Khaiyub* [2014] FJCA 190; ABU0009.2014 (5 December 2014)(Per GunaratneJA)(unreported) and *Ghim Li Fashion (Fiji) Ltd v Ba Town Council* [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014).(all unreported), considered the delay and explanation given for such delay. Considering the ratio of the said cases, there is no explanation for delay of more than 27 days since the dismissal of previous application. At the same time the explanation given for delay of more than 45 days could not be accepted.
14. At the hearing counsel stated that there were defects in the pleadings which is the proposed ground 9. I can't see merits in that ground as pleadings are not compulsory in Magistrate's Court. Considering other grounds do not show 'more than a reasonable chance of succeeding' as the delay was inordinate. The application for extension is dismissed. The counsel for Applicant was unable to show such a ground that has more than reasonable chance of success.

CONCLUSION

15. The Applicant had failed to explain the delay to the satisfaction of the court to exercise its discretion in favour of the extension. This is a matter where Order III Rule 9 of the Magistrates' Court Rules relied by the Applicant after conclusion of the case. The threshold in such an instance is not the same as when the same provision is relied while the action is pending and extension is sought for some time period. The application needs to be dismissed for repeated lapse on the part of the Applicant and failure to establish 'more than a reasonable chance of succeeding in appeal'. Such unexplained repeated delay can be explained as inordinate. Accordingly the application for extension to file grounds of appeal and stay are also struck off. The cost is summarily assessed at \$1,000.

FINAL ORDERS

- a. The Originating Summons dated 18th April, 2017 is struck off.
- b. Cost of this application is summarily assessed at \$1,000.

Dated at Suva this 2nd day of June, 2017.



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Justice Deepthi Amaratunga
High Court, Suva