

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 371 of 2011

BETWEEN: **LUKE RAGG** of Suva, Real Estate Agent

PLAINTIFF

AND: **YUMIKO YAMAGATA** at the Trustee of the Yamagata Children's
Trust of 28957 Cliffside Drive, Malibu CA 90265, United States of
America

DEFENDANT

BEFORE: **Hon. Justice Kamal Kumar**

COUNSEL: Ms S. Shameem and Ms S. Devan for the Plaintiff/Applicant
Mr R. Singh and Ms M. Vasiti for the Defendant/Respondent

DATE OF HEARING: 26 June 2018

DATE OF RULING: 22 March 2019

RULING
(Application for Leave to Appeal Out of Time)

1.0 Introduction

- 1.1 On 15 March 2018, Plaintiff (hereinafter referred to as **“the Applicant”**) filed Summons for Extension of Time to file Notice of Appeal in respect to Master’s decision delivered on 18 October 2017.
- 1.2 The Application was called on 13 April 2018, when parties were directed to file Affidavits/Submissions and the Application was adjourned for hearing on 26 June 2018.
- 1.3 Parties filed Submissions and the Application was heard on 26 June 2018, and adjourned for ruling on notice.
- 1.4 Following Affidavits were filed on behalf of the Applicant and the Defendant (hereinafter referred as **“Respondent”**).

For Applicant:

- (i) Applicant’s Affidavit in Support sworn on 14 March 2018, and filed on 15 March 2018 (**“Applicant’s 1st Applicant”**);
- (ii) Applicant’s Affidavit in Reply sworn and filed on 25 May 2018 (**“Applicant’s 2nd Affidavit”**).

For Respondent

Affidavit in Opposition of Respondent sworn on 10 May 2018 ad filed on 23 May 2018 (**“Respondent’s Affidavit”**).

2.0 Chronology of Events

- 2.1 On 15 December 2011, Plaintiff filed Writ of Summons with Statement of Claim pursuant to Leave granted on 18 December 2011.
- 2.2 On 12 and 27 January 2012, Defendant filed Acknowledgement of Service and Statement of Defence.
- 2.3 On 23 February 2012, Plaintiff filed Reply to Defence.

- 2.4 On 1 June 2012, Applicant filed Summons for Direction (“**SD**”) and on 29 June 2012, being returnable date of Summons for Direction was made.
- 2.5 On 2 August 2012, Applicant filed Affidavits Verifying List of Documents (“**AVLD**”).
- 2.6 On 24 October 2012, Respondent filed AVLD.
- 2.7 On 21 December 2012, Respondent filed Supplementary AVLD.
- 2.8 On 10 May 2013, Respondent filed Application for Interrogatories and on 7 June 2013, Applicant was given time to provide information when this matter was adjourned to 27 June 2013.
- 2.9 On 7 June 2013, Applicant informed Court that he will provide information to Defendant within three weeks and this matter was adjourned to 27 June 2013.
- 2.10 On 27 June 2013, Counsel for Respondent confirmed receiving information from Applicant and sought three (3) weeks to consider those when this matter was adjourned to 25 July 2013.
- 2.11 On 9 September 2013, Munro Leys filed Notice of Change of Solicitors on behalf of Respondent.
- 2.12 This matter was next called on 19 September 2013, when Respondent sought three to four weeks to consider information and this matter was adjourned to 18 October 2013.
- 2.13 On 18 October 2013, Counsel for Applicant sought time to file Affidavit when this matter was adjourned to 28 November 2013, and it was again adjourned to 3 February 2014.
- 2.14 On 24 January 2014, Applicant filed Answer to Interrogatories and on 3 February 2014, Respondent sought time to take instructions and review answers when this matter was adjourned to 26 February 2014.
- 2.15 On 2 February 2015, Applicant filed Notice of Intention to Proceed.

- 2.16 On 25 March 2015, Applicant was served Notice pursuant to Order 25 Rule 9 and Order 3 Rule 5 of High Court Rules to show cause why this action should not be struck out for want of prosecution.
- 2.17 On 28 April 2015, Applicant filed Affidavit to Show Cause.
- 2.18 On 14 May 2015, Applicant was given time to file Supplementary Affidavit and this matter was adjourned to 8 July 2015.
- 2.19 On 8 July 2015, the Show Cause Notice was adjourned to 29 July 2015, for Ruling.
- 2.20 This matter was next called on 3 September 2015, and adjourned to 5 October 2015, for mention and then adjourned to 4 November 2015, and 3 February 2016.
- 2.21 On 3 February 2016, this matter was adjourned to 1 March 2016, and then to 18 March 2016, to sort out interrogatories.
- 2.22 On 10 March 2016, Naidu Law filed Application for Leave to withdraw as Solicitors for Applicant and on 18 March 2016, such leave was granted by then Master and this matter was adjourned to 30 March 2016.
- 2.23 On 30 March 2016, this matter was adjourned to 7 April 2016.
- 2.24 This matter was next called on 12 April 2016, when Solicitors for Plaintiff were directed to file Notice of Change of Solicitors and this matter was adjourned to 15 April 2016.
- 2.25 On 12 April 2016, Shameem Law filed Notice of Appointment of Solicitors on behalf of Applicant.
- 2.26 On 15 April 2016, this matter was adjourned to 24 May 2016, for parties to sort out interrogatories.

- 2.27 On 24 May 2016, Counsel for Applicant informed Court that Applicant filed Application for Specific Discovery when this matter was adjourned to 5 July 2016.
- 2.28 On 16 June 2016, Applicant filed Summons for Specific Discovery and on 5 July 2016, parties were directed to file Affidavits when the Application was adjourned to 22 August 2016, for mention.
- 2.29 This Application for Specific Discovery was next called on 23 August 2016, when parties were granted thirty (30) days to file Affidavits and the Application was adjourned to 24 November 2016, for hearing.
- 2.30 On 30 September 2016, Respondent filed Affidavit of Sharon Morris annexing Affidavit of Defendant in Opposition.
- 2.31 Hearing date was 24 November 2016, was vacated and the Application for Specific Discovery was re-listed for hearing on 29 November 2016.
- 2.32 On 29 November 2016, Respondent was granted further time to file Affidavit in Response and the Application was adjourned to 5 April 2017, for hearing.
- 2.33 On 22 December 2016, Respondent filed Affidavit in Response.
- 2.34 On 5 April 2017, hearing date was vacated on Application of Applicant's Counsel and re-listed for 19 April 2017, for hearing and again was adjourned to 1 June 2017, for hearing.
- 2.35 Application for Specific Discoveries was part heard on 1 June 2017, and adjourned for continuation on 5 June 2017 and adjourned to 27 July 2017, for continuation of hearing when hearing was concluded and the Application was adjourned to 4 October 2017, for ruling.
- 2.36 Ruling in respect to Application for Specific Discovery was delivered on 18 October 2017.
- 2.37 On 25 October 2017, Respondent sealed the Order.

- 2.38 On 16 November 2017, this matter was called before then Master when two (2) AVLDs filed by Respondents Solicitors Clerk was by consent expunged from Court file when parties were directed to hold Pre-Trial Conference (**PTC**) on 27 November 2017, and this matter was adjourned to 29 November 2017.
- 2.39 On 29 November 2017, time to hold PTC was extended to 14 February 2018.
- 2.40 On 5 December 2017, Respondent filed Sharon Morris' Affidavit annexing Respondent's AVLD.
- 2.41 On 14 February 2018, Counsel for Applicant informed Court that they taking instructions in respect to Master's Ruling on Specific Discovery Application when this matter was adjourned to 15 March 2018.
- 2.42 On 15 March 2018, Counsel for Applicant informed Court that they have instructions to appeal Master's decision when Court noted that pleadings have been completed, both parties filed AVLD and PTC was held and adjourned this matter to 10 April 2018.
- 2.43 On 15 March 2018, Applicant filed Application for Extension of Time to Appeal.

3.0 Application for Leave to Appeal Out of Time

3.1 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-parte 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.”

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

3.3 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 or merits of the case; 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.

3.4 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.

3.5 **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 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 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.

3.6 In this instant Application for Leave to Appeal was to be filed within 14 days (Rule 11) from 18 October 2017, and that is by 1 November 2017.

3.7 Application for Leave to Appeal out of Time was filed on 15 March 2018, that is almost three and half months later after time to file Application for Leave to Appeal had expired.

3.8 I find that there has been inordinate delay by the Applicant in filing the Application.

Reasons for delay

3.9 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.

3.10 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.”

- 3.11 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 to when time started running for Appeal.

3.12 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 Appeal judgment concerning 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]

- Miscalculation of Time: **McCaig v. Manu** [2012] FJSC; CBV 2 of 2013 (27 August 2012).
- Unable to pay legal fees: **Datt v. Datt** [2013] FJCA; Misc Action 53 of 2011 (7 June 2013).

3.13 At paragraph 4 to 8 of Ragg's 1st Affidavit he states as follows:-

“4. After the decision was delivered I discussed the Ruling and Orders with my father David H.P. Ragg and we resolved to ask our solicitors to appeal the Hon. Master's Ruling.

5. However we had insufficient funds to be able to appeal the Orders and I was unable to instruct the solicitors within the time allowed for appealing the decision.
6. At the same time I needed time to discuss the Ruling with my family so as to be able to consider whether we could afford to appeal the Master's Ruling.
7. My solicitors also advised me that my substantive claim which was at discovery stage had to be amended but with the Master's Ruling in place my claims could be aborted since the main basis of which I was claiming against the Defendant depended on my information before the Court that Jim Jannard, whom I had registered with the Defendant, in terms of my agreement with her was the owner of the properties that had been sold by her without paying me the commission owed to me.
8. Under those circumstances my entire claim was in jeopardy and I could not move forward with my substantive claim at all in light of the Hon. Master's Ruling."

3.14 Applicant always had Solicitor on record with whom he should have discussed the Master's Ruling and the need to appeal the decision.

3.15 Applicant should have known that there is a strike out time for appealing decision of Master and such should have got whatever advice he needed to get prior to prescribed time.

3.16 This Court finds that the need to discuss the need to appeal with family members is totally unsatisfactory reason for failure to comply with Rules of the Court.

3.17 Applicant's reason that he had insufficient funds is surprising, which makes this Court wonder as to how will be fund the substantive proceedings if he is not able to fund Appeal of an interlocutory decision.

- 3.18 This Court also takes note of the fact after Master's decision, Applicant was legally represented on 16 November 2012 and 14 February 2018 at paragraphs 2.38 and 2.41 of this Ruling.
- 3.19 In fact on 14 February 2018, Applicant's Counsel informed Court that they taking instruction to appeal Master's decision.
- 3.20 There is no explanation as to why no Application for Extension of Time was filed on or about 14 February 2018.
- 3.21 In **Datt v. Datt** his Lordship Justice Calanchini stated as follows:-
- “[11]. I have no hesitation in concluding that the explanations offered by the Applicant fall well short of being what may be described as “wholly excusable”. Certainly the explanations were not sufficient to justify the exercise of the discretion to grant leave to the Applicant.”
- 3.22 One of the reasons for delay in **Datt's** case which Court of Appeal felt could fall short of “wholly excusable” was that Applicant in that case was held and unable to pay legal fees.
- 3.23 This Court also has no hesitation in holding the reason for delay advanced by Applicant “fall short of what needs be described as wholly excusable” and totally unsatisfactory.

Chance of Success of Appeal/Merit of Appeal

- 3.24 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.”

3.25 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.”

3.26 The principle in dealing with Appeals against interlocutory orders has been stated in **Gosai v. Nadi Town Council** [2008] FJCA 1.ABU116.2005 (22 February 2008) as follows:-

“28. APPEAL ON INTERLOCUTORY DECISION

*In coming to the decision that the appeal should be refused, the Court has also had reference to the High Court’s decision in **Heffernan v. Byrne and Ors** HCF Civil Action No. HBM 105 of 2007 (19 February 2008). There, in refusing leave to appeal against an interlocutory decision, His Lordship set out a comprehensive collocation of the authorities, referring to **Kelton Investments Limited an Tappoo Limited v. Civil Aviation Authority of Fiji and Motibhai & Company Limited** [1995] FJCA 15, ABU 0034d.95s; **Edmund March & Ors v. Puran Sundarjee & Ors** Civil Appeal ABU 0025 of 2000; and **KR Latchan Brothers Limited v. Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. 12 of 1994 (Full Court).*

29. As His Lordship observed, in **Edmund March & Ors** this Court said:-

*As stated by Sir Moti Tikaram, President Fiji Court of Appeal in **Totis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** (Civ. App. No. 33 of 1996 p. 15):*

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances.

30. Further, as His Lordship also noted, in **KR Latchan Brothers Limited** a Full Court of Appeal (Tikaram, Quillam and Savage JJ) said:

*... The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in **Ashmore v. Corp. of Lloyd's** [1992] 2 All ER 486-*

Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.”

- 3.27 Applicant will need to establish that the Learned Master (as he then was) exercised his discretion in refusing Application for Specific Discovery was plainly wrong and there are exceptional circumstances.

- 3.28 At paragraph 2.1 to 2.4 of Applicant’s Submission it is submitted:-

“2.1 That the Learned Master erred in the fact that the Plaintiff was aware of the amounts for which the islands of Kaibu, Vatuvara, Kanacea and Adivaci were sold when all he submitted were the sale price during the course of the agreement with me; however these were actually sold overseas without any authority being aware of the real sale price.

2.2 That the Learned Master erred in law and fact when he ruled that there

was inexcusable delay in making the application. The additional two islands which were sold only came to the attention of the Plaintiff through the media and industry information after the initial claim had been made.

2.3 *That the Learned Master erred in law when he stated that the remaining two islands Kanacea and Adivaci were not in issue in the pleadings and therefore the Court could not make orders for further and better particulars in this regard. The Plaintiff had no knowledge that these islands which were registered with his company had also been sold by the Defendant until much later.*

2.4 *That the Learned Master erred in fact and law when he accepted the assurance of the Defendant's solicitor that the islands had not been sold to Jim Jannard and/or Dwight Manley when the records from the US authorities showed that there was a nexus and a smoking gun in relation to the sale of the land and these two individuals who the Plaintiff had registered with the Defendant."*

3.29 It is apparent from Master's decision that he had considered Application for Specific Discovery thoroughly and applied the principles and Rules dealing with such Application.

3.30 This Court is of the view that the Master exercised his discretion judiciously and his Decision is not plainly wrong or there are no exceptional circumstances that show that Applicant has any prospects of success in overturning the Master's decision.

Prejudice

3.31 Applicant submits that the proceeding is at substantive stage and enlarge of time will not cause Respondent any prejudice.

3.32 It is apparent from paragraph 2 of this Ruling and what has rightly been submitted by the Respondent that it is the Applicant who has been responsible for dragging this matter from 2011.

- 3.33 Mere fact that this matter is still in progress and not tried as in proceedings in this case the Defendant will not be prejudiced cannot be accepted.
- 3.34 People need to resolve the dispute filed in Court expeditiously.
- 3.35 This Court accepts Respondent's submission that Respondent will be prejudiced if this matter drags along.
- 3.36 This matter was instituted in 2011, and needs to see the light of day.
- 3.37 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."

- 3.38 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."

4.0 Conclusion

- 4.1 I hold that the delay in filing Leave to Appeal Out of Time is inordinate, Plaintiff/Applicant has failed to reason the delay in filing Application for Leave to Appeal Out of Time is totally unsatisfactory and inexcusable. Appeal has no real prospect of success if time for appeal is extended and the Respondent will be prejudiced in opposing an unmeritorious appeal.

4.2 Accordingly I make following Orders:-

- (i) Application by Summons for Extension of Time to Appeal dated 14 March 2018, and filed on 15 March 2018, is dismissed and struck out;
- (ii) Plaintiff/Applicant do pay Defendant/Respondent's costs assessed at \$1,000.00 within fourteen (14) days from date of this Ruling.




Kamal Kumar
JUDGE

At Suva
22 March 2019

SHAMEEM LAW for the Plaintiff/Applicant
MUNRO LEYS for the Defendant/Respondent