

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

Civil Action No.: HBC 89 of 2017

IN THE MATTER of Section 119 of  
the Property Law Act (Cap 130)

AND IN THE MATTER of Section 5 of the Succession,  
Probate and Administration Act (Cap 60)

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**BETWEEN** : **SERU TARALAILAI** of Vunato, Lautoka, Fiji Security Officer as  
Intended Administrator in the Estate of Vasita Koropa aka Vasita  
Kororapa Taralailai

**1<sup>st</sup> PLAINTIFF**

**AND** : **TEVITA SENIVIAVIA VOLANACAGI TARALAILAI** of 109,  
Grantham Road, Raiwaqa, Suva, Fiji, Fitter at Water Authority of Fiji as  
beneficiary in the Estate of Vasita Kororapa aka Vasita Kororapa  
Taralailai.

**2<sup>nd</sup> PLAINTIFF**

**AND** : **ALESI NAILOLO TARALAILAI** of 109 Grantham Road, Raiwaqa,  
Suva, Office Girl in USP as beneficiary in the Estate of Vasiti Kororapa  
aka Vasita Kororapa Taralailai.

**DEFENDANT**

Counsel : **1<sup>st</sup> Plaintiff: Mr. Anthony M**  
: **Defendant: Mr. Niubalavu P**  
: **No appearance for 2<sup>nd</sup> Plaintiff.**

Date of Hearing : **16.7.2020**

Date of Judgment : **24.7.2020**

## JUDGMENT

### INTRODUCTION

1. This is a summons filed by the Defendant seeking extension of time to file leave to appeal against the Master's decision of 8.11.2019 and also seeking leave to appeal against the same decision. This action was filed by trustee for a property belonging to an estate. There was a consent judgment entered and according to that Defendant was granted sixty days from execution of sale and purchase agreement, for 'settlement'. This property was a house belonging to her late mother's estate where first Plaintiff (the Plaintiff) was the administrator and trustee. Defendant could not get the finance arranged, for the purchase of the house within time. So, she sought extension of thirty days, from court in terms of Order 3 rule 4(1) of High Court Rules 1988. Master in the ruling stated that Defendant had '*provided sufficient reasons*' as to the failure to complete sale within sixty days of sale and purchase agreement. Having stated so, Master had refused the extension of time, on the basis that Plaintiff had entered in to subsequent sale and purchase agreement with a third party. Master had not considered that property belonged to an estate where the Plaintiff was the administrator hence his actions were subjected to Trustee Act 1966. There were serious allegations made against the Plaintiff as administrator and trustee of the estate, and also undisputed facts such as price of the said impending sale and acceptance of an advancement for sale of property, prior to close of tenders etc. Master had not considered application of Section 28 of Trustee Act 1966, which could impeach a concluded transfer. Plaintiff had informed the Defendant that he had already accepted an offer for \$100,000 but within eight days, entered for a sale and purchase agreement for \$60,000. Discretion to extend time is not mechanistic and proper exercise is essential if not inordinate delay will result and more delay and prejudice to parties. There are strong and cogent arguable grounds for the Defendant to seek leave to appeal against Master's ruling, hence extension of time is granted for leave to appeal against Master's decision of 8.11.2019 and leave to appeal is also granted to Defendant against said decision.

### FACTS

2. The Defendant on the 25.6. 2020 filed an Inter-Parte Summons seeking the following orders:-
  - a. That the Appellant/ Defendant be granted leave to file an Appeal out of time against the Ruling of the Acting Master Vandhana Lal delivered on 8<sup>th</sup> November 2019.

- b. That the Appellant/Defendant be granted leave to Appeal the Ruling of the Acting Master Vandhana Lal delivered on 8<sup>th</sup> November 2019.
  - c. That the sale of the subject property comprised in Housing Authority Lease No. 234329 be stayed until the determination of the Appeal.
3. There was a typographical error in the Order sought. The amendment was sought in terms of Order 20 rule 7 of the High Court Rules 1988 and it was allowed without any objection and the counsel for the Plaintiff's gracious indulgence in this regard is appreciated.
4. The order sought in paragraph one of the Summons is amendment and reads as:-

*"That the Appellant/Defendant be granted leave to file Leave to Appeal out of time against the Ruling of the Acting Master Vandhana Lal delivered on 8<sup>th</sup> November 2019"*
5. First Plaintiff filed this action by way of originating summons seeking sale of property belonging to estate of late Vaita Kororapa. Deceased was late mother of Defendant.
6. Defendant was also beneficiary of the estate. There were only three equal share beneficiaries (i.e Plaintiff and Defendant) and all of them entered in to settlement which allowed Defendant to purchase the house for a fixed price.
7. Second Plaintiff who was the other 1/3 equal share beneficiary of the property in issue supported Defendant's applications to court including present application. It is the Plaintiff who is administrator and beneficiary of 1/3 who is objecting to the Defendant's application.
8. Defendant was required to complete settlement of the transfer within sixty days from the execution of the sale and purchase agreement. The property belonged to Housing Authority hence the consent was also required from them for the sale.
9. Defendant who was relying on entirely for funds from her gratuity and or financial services could not secure the amount agreed within sixty day time period and could not comply with the orders entered with consent of the parties.
10. The Plaintiff's lawyers had indicated that since Defendant could not finalize the sale and purchase of the property within sixty day time period they had accepted an offer of

\$100,000 on 30.5.2019. Till that date Defendant had sought extension of time through amicable manner.

11. After hearing of the impending sale for \$100,000, Defendant sought extension of time in terms of Order 3 rule 4(1) of High Court Rules 1988 and after hearing Master refused thirty day extension to finalize transfer. But in the said application it was revealed the Plaintiff was going to sell to much lower price and had already accepted part payment.
12. On 2.3.2020 Defendant sought to cancel the sale and purchase agreement entered with a third party for a sum of \$60,000 and direction for the Plaintiff for a public auction of the property, and this application was pending when the present application seeking extension of time and leave to appeal against the Master's decision was filed.

### ANALYSIS

13. The Order 59 rule 8 of the High Court Rules of 1988 states as follows

“8(1) An appeal shall lie from a final order or judgment of the Master to a single judge of the High Court.

(2) No appeal shall lie from an **interlocutory order** or judgment of the Master to a single judge of the High Court without **the leave of a single judge** of the High Court which **may be granted or refused** upon the papers filed” (emphasis added)

14. The Order 59 rule 8(1) had no application to the Ruling of the Master delivered on 8.11.2019 as it was an interlocutory order in line with Fiji Court of Appeal decision of *Goundar v Minister for Health* [2008] FJCA 40; ABU0075.2006S (9 July 2008) (unreported).
15. So leave to appeal is required to appeal against said order of 8.11.2019 and the time period for seeking such leave was fourteen days in terms of Order 59 rule 11 of High Court Rules 1988. There was no provision to extend time specifically for such an application though such extension is granted when it relates to an appeal or cross appeal in terms of Order 59 rule 10 of High Court Rules 1988.
16. Order 59 rules 10 and 11 of the High Court Rules 1988 state as follow  

‘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 expiration of that period.

(2) An application under paragraph (1) shall be made by way of an inter- parte summons supported by an affidavit.

Application for leave to appeal (O.59, r.11)

11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, **filed and served** within 14 days of the delivery of the order or judgment.' (emphasis added).

17. The Order 3 rule 4 of the High Court Rules of 1988 applies to all the rules as well as to any directions of the court including orders and or judgments. It is wide enough to capture present situation, It states as follow;

‘4(1) **The Court may**, on such terms as it thinks just, by order **extend or abridge the period within which a person is required or authorized by these rules**, or by any judgment, order or direction, to do any act in any proceeding’. (emphasis added)

18. Defendant relied on the above provision to seek extension of time from Master. Same provision was relied upon for extension of time for leave to appeal as no application seeking leave to appeal was made within fourteen days from 8.11.2019.

19. The application for extension of time was made on 25.6.2020 and the impugned decision was made on 8.11.2019. The delay was over six months excluding time where court was not functioning due to declaration of pandemic and or lockdown.

20. Apart from above mentioned closure of court due to lockdown, there was court vacation. Defendant did not thought of appealing against Master’s decision, but sought some other orders prior to filing present summons.

21. Defendant who was seeking court’s intervention, to keep family home, had to come this far spending much time and money due to refusal of extension of thirty days. Parties in a civil litigation often consent to extension of time considering circumstances. So first recourse is normally to parties and or their solicitors and this is not a thing that should discourage. This is more so in an economic recession where people are reluctant for unnecessary spending.

22. Extension of time in terms of Order 3 rule 4(1) of High Court Rules 1988 needs careful exercise of discretionary power of the court, that can eliminate injustice, but if exercised wrongly can deny justice and or access to justice.

23. Defendant's request for thirty day extension for 'settlement' of the sale was denied. Now even after one year from her initial request, parties are before court, and sale of the property could not be finalized. Reluctance of flexibility by administrator or trustee towards beneficiaries had resulted this delay which is counter productive .
24. It is important to exercise discretion for administration of justice. In my opinion though the settlement entered by the court needed to be complied, there will be instances where unforeseen delay may result a party at disadvantageous position and extension of short time period such as thirty days cannot prejudice anybody. If the parties are unable to such an amicable extension court can exercise its discretion. This is the purpose of having a provision such as Order 3 rule 4 of the High Court Rules 1988.
25. The discretion of the court should not be in favour of refusal of extension of time when there are merits, as in this instance, though such a course would be path of least resistance, and also conclusion of an action. Prolonging a matter may serve justice than quick disposal of that without consideration of merits.
26. There are differences of opinion on the exercise of discretion, and no rigid rules can substitute this reality. When a party failed to perform a particular act in the specified time it may be due to one reason or culmination of several reasons as in this case.
27. The delay in this summons is over six months. Some of the reasons are self-evident from the record of the case as in this case. Defendant had not sought litigation as the first cause of resort when her application for thirty day was refused by Master. At that time she was seeking amicable extension, relying on the clauses of the sale and purchase agreement. As stated earlier in this judgment such behavior of a party aggrieved, was justified.
28. 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)

29. Above quote, in *Ratnam vs. Cumarasamy and Another* [1964] 3 All E.R. 935 did not prohibit enlargement of time, but emphasized the reason of delay in the exercise of discretion. In my judgment if there are reasons that could justify the reason for delay it can be granted. In this instance Master's refusal to grant extension of thirty days, failure to consider grave injustice that would occur to Defendant by such refusal as against third party who was the prospective buyer, the price of the sale and acceptance of the advance payment even before the close of tender, and impact on that on Section 28 of Trustee Act 1966 were merits of the appeal that favour more than an arguable appeal.
30. The time period was over six months, but that had pandemic time period where lockdowns were exercised as well as court vacation prior to that. Plaintiff was residing in Lautoka whereas Defendant was from Suva had also contributed to this delay and more importantly impecunious nature of the Defendant had resulted she preferring amicable settlement rather than litigation.
31. The time period for delay, the reason for delay and merits of the leave to appeal are considered and the cumulative effect of all the said grounds are considered in the exercise of discretion to extend the time period.
32. About three decades after *Ratnam vs. Cumarasamy and Another* [1964] 3 All E.R. 935 was pronounced, *Finnegan v Parkside Health Authority* [1997] EWCA Civ 2774; [1998] 1 All ER 595 the identical provision to High Court Order 4(1) in UK (O.3 r.5) was extensively considered. In that case (Hirst LJ) number of previous decisions (including *Ratnam vs. Cumarasamy and Another* [1964] 3 All E.R. at page 935) that had different outcomes were discussed and concluded as follow (p 604)( Per Hirst LJ)

‘At the end of the day, the key criteria in the present case were guidelines 2 and 10 as laid down in the Mortgage Corp case, showing that the overriding principle was that justice should be done, and that in considering whether to grant an extension of time the court would look at all the circumstances including the other considerations mentioned in that judgment.’

Further held (p 604)



**‘In my judgment the starting point is RSC Ord 3, r 5 itself, which explicitly confers the widest measure of discretion in applications for extension of time, and draws no distinction whatsoever between various classes of cases...’** (emphasis added)

33. Before arriving at the said conclusions Hirst LJ in *Finnegan v Parkside Health Authority* [1997] EWCA Civ 2774; [1998] 1 All ER 595 at 596 considered number of decisions that discussed the exercise of discretion under O.3 r.5 in UK (analogous to Order 3 rule 4(1) of High Court Rules of 1988) in detail, and I would quote some of them for completeness and also those UK decisions are helpful as guiding principles for the use of discretion under said High Court Rule.

At pages 598-599 (Per Hirst LJ)

‘In the leading judgment with which Stuart-Smith and Simon Brown LJJ agreed Bingham MR stated as follows ([1993] 1 All ER 952 at 959–960, [1993] 1 WLR 256 at 263–264):

‘We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary. **The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed.** The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court’s inherent jurisdiction to dismiss for want of prosecution. **The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.** This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings. **Neither of these principles is absolute.** If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff’s default had caused prejudice to the defendant. But the court’s practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing



and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule. **The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb. A rigid, mechanistic approach is inappropriate.** Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.' (emphasis added)

At pages 601- 602 (Per Hirst LJ)

".....in Mortgage Corp Ltd v Shand [1996] TLR 751, [1996] CA Transcript 1634, which was originally reported in the Times Newspaper on 27 December 1996. In that

case the plaintiff was seeking an extension of time for the exchange of witness statements and expert's reports. The appeal was from the decision of Astill J, who had refused leave on the footing, as described by Millett LJ, that unless there were good reasons for the failure to comply with the rules or directions of the court the discretion to extend time would not be exercised.

Millett LJ, with whom Potter LJ and Sir Christopher Slade agreed, expressly **rejected the argument** based on Astill J's approach that the **absence of good reason was always and in itself sufficient to justify the court in refusing to exercise its discretion**, and held that the true position was that once a party was in default, it was for him to satisfy the court that despite his default, the discretion should nevertheless be exercised in his favour, **for which purpose he could rely on any relevant circumstances**.

There then followed (at 752) a most important passage where the court laid down general guidelines as follows:

'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be

made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.’ (emphasis added)

34. In *Southwark London Borough Council v Nejad and others* [1999] All ER (D) 36 UK Court of Appeal (Civil Division) applied abovementioned decision and held that ‘**mechanistic approach**’ to extension of time should not be adopted. Lord Justice Waller held,

“Our attention was drawn to *Finnegan v Parkside Health Authority* [1998] 1 W.L.R. 411; *Costellow v Somerset C. C.* [1993] 1 W.L.R. 256; and *The Mortgage Corporation Ltd v Sandoes and Ors.* [1997] P.N.L.R. 263. Both sides supported those authorities as laying down the correct principles. What those authorities demonstrate is that the courts **should not adopt a mechanistic approach to questions of extending time**. The court should not for example fetter itself from exercising discretion to extend time **simply because there is no explanation for the delay and in particular because there is no explanation which is acceptable as a reason for the delay**. Each case will depend on its own circumstances. But I would emphasise the explanation given or the lack of it or the frankness of it are factors which the court is entitled to take into account in exercising its discretion, and the prejudice to the opposing party is also a factor to be placed in the scales, but is not necessarily determinative any more than any other factor. The exercise is one of balancing all the relevant factors, and where the result of not granting an extension will be draconian, the court is concerned to assess the proportionality of the resulting penalty to the applicant to his failure or failures.” (emphasis added)

35. The delay in this instance is self-evident, for which tactic of the solicitors had also contributed. Defendant’s solicitors had preferred, nullification of the sale for \$60,000 in this action, to an application seeking leave to appeal. This can be due to strict and rigid threshold that is required to obtain leave to appeal.
36. In my judgment there is an explanation for delay of over six months and in the circumstances of this case it can be accepted. It should also be noted if the application for extension is refused solely on the delay, what is the scope of Order 3 rule 4(1) of High Court Rules 1988? The purpose of the said provision is to grant extension, in appropriate situations. So there cannot be rule of thumb, for the length of delay, it is depended on other factors such as prejudice to other parties.

37. In this action only Plaintiff was objecting to Defendant's request for thirty days for a more than one year. So prejudice to him was due to his own action and cannot be blamed to others.
38. The sale and purchase agreement for the sale of the property was entered on 7.6.2019 just eight days after Plaintiff informed Defendant he had accepted an offer of \$100,000 through his solicitors. There must be a good reason to accept 60% of the said price as sale price for the same property and none was revealed. In such a situation Trustees Act 1966 had application and prejudice to third parties such as prospective buyer cannot deny extension of time.
39. Merits of the appeal as submitted at this stage is important in granting leave to appeal as well as extension of time for leave to appeal. Since extension is sought there should be strong arguable grounds. (see Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc, The Saudi Eagle, [1986] 2 Lloyd's Rep 221 where higher threshold was applied to set aside default judgment). In the exercise of discretion court has power to apply a higher threshold when seeking extension of time for leave to appeal, compared with leave to appeal filed within time, but this again should not be used to reject an extension where there are obvious merits in the appeal.
40. The grounds of appeal as stated in the affidavit in support are as follows.
  - a. The interests of the beneficiaries, as a willing buyer and occupier of the family home was never taken into account;
  - b. The issues and fraudulent conduct of the parties surrounding the sale and purchase between the 1<sup>st</sup> Plaintiff and the new purchaser referred to in the Ruling was never taken into account;
  - c. The fact that there was no consent obtained from Housing Authority at the time of the Hearing before the Master was not taken into account; and
  - d. The fact that the Terms of Settlement and Order made on the 23<sup>rd</sup> November 2017 is vague which cannot be relied by either of the parties to complete settlement.
41. I do not propose to deal with the said grounds in detail but suffice to consider there are merits specially when Master had failed to consider Section 28 of Trustee Act 1966 which states as follow

*\*Power to sell subject to depreciatory conditions*

28.-(1) A sale by a trustee shall not be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

(2) A sale by a trustee shall not, **after the execution of the conveyance or transfer**, be impeached as against the purchaser, upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, **unless it appears that the purchaser was acting in collusion** with the trustee at the time when the contract for sale was made.

(3) A purchaser, upon any sale by a trustee, shall not be at liberty to make objection against the title upon any of the grounds mentioned in this section.” (emphasis added)

42. Section 28 of Trustee Act 1966 allows even conclude transfers to be impeached for collusion. The conduct of the Plaintiff in the dealing where he had accepted advance payment for the property of the estate, in suspicious circumstances, was a ground even to impeach any concluded sale. So reliance of sale and purchase agreement, without considering the statutory provisions that govern sale of trust property for refusal of the extension of time by Master is a strong arguable ground for appeal. This was not included specifically as a separate ground but this can be included as a separate ground for clarity. The present ground regarding ‘fraud’ is wide enough to capture such a contention, and it can be refined and more precise.
43. The Defendant is beneficiary of 1/3 share, a willing buyer and occupier of the family home whose interests should be taken into account specially when another beneficiary of 1/3 who is named as second Plaintiff is supporting her application. Administrator should consider interest of all the parties and his refusal to grant thirty day extension to Defendant and acceptance of a tender in a hurriedly manner for substantially lower price than first tender of \$100,000 are all grounds that affect the discretion of the court in granting extension of time period.
44. *DEG-Deutsche Investitions und Entwicklungsgesellschaft mbH v Koshy; Gwembe Valley Development Co Ltd v Koshy*, [2003] EWCA Civ 1048; [2004] 1 BCLC 131; (2003) Times, 9 September; [2003] All ER (D) 465 (Jul) , UK Court of Appeal had reiterated duties of trustee and that the property held by trustee were for the benefit of all the beneficiaries. In this instance Plaintiff was only a beneficiary of minority share, hence majority’s concern cannot be shut out. These are arguable issues for Defendant in the appeal seeking extension of time.



45. In the exercise of my discretion in terms of Order 3 rule 4(1) all the circumstances must be considered. The absence of reason for delay is not a paramount consideration and reason for delay in this case are understandable from the record itself though it was more than six months. Access to justice cannot be denied mechanistically which can result in injustice to a party because of delay.
46. In *WakayaVs Chambers et al* (unreported) (decided on 10<sup>th</sup> November, 2011) Fiji Supreme Court (Gates CJ) quoted the following passage from *Emanuel v Australian Securites Commission* [1997] HCA 20; 144 ALR 359 Kirby J
- “There is a reason for the tendency in the series of cases cited by McHugh JA in *Woods v Bate*... and in other cases to like effect, for the reluctance of courts in recent times to invalidate acts done pursuant to a statutory condition. Courts today are less patient with merit less technicalities. **They recognize the inconvenience that can attend an overly strict requirement for conformity to procedural preconditions. In the morass of modern legislation, it is easy enough, even for skilled and diligent legal practitioners** (still more lay persons who must conform to the Law) **to slip in complying with statutory requirements.....An undue rigidity in insisting upon strict compliance with all of the procedural requirements of the law could become a mask for injustice and a shield for wrong- doing.**” (emphasis is mine)
47. So the paramount consideration is injustice to the party seeking leave and merits of the appeal grounds. More weight is given to such grounds though delay and explanation for delay are considered and a cumulative effect is taken.
48. After that she was told by the solicitors for the Plaintiff that their client had accepted tender for that property \$100,000. This amount was in any event more than twice the price she was going to pay as settlement between parties. Since Defendant was beneficiary of 1/3 share, she could also benefit substantially from such a sale, but this was not the price finally accepted by the Plaintiff.
49. In contrary to what was informed to the Defendant, the Plaintiff had entered in to sale and purchase agreement for substantially reduced price of \$60,000 which can be subject to impeach in terms of Section 28 of Trustee Act 1966 by the beneficiaries as the price was 60% of the earlier tender which was allegedly accepted by the administrator of the estate, why such a discounted price was accepted within a very short raises some issues which cannot be dealt in this application.



50. Defendant had sought to nullify said sale and purchase agreement and that application is pending before the court. While this application got delayed due to closure of court and also failure to make the prospective purchaser a party present application was sought.
51. Interlocutory orders were often made while an action was pending before the court and finality to orders of the court are essential for progress of the action to finality. This cannot be applied to all interlocutory decisions in present classification.
52. This reasoning will not be always be applicable to all the cases, as in this instance. Though Master's decision, was interlocutory there was no case pending in court and action had concluded with settlement. So Master's decision of 8.11.2020 was a stand alone decision to already concluded matter. Master's refusal to extend the orders for thirty days had resulted, Defendant seeking extension in this court even after seven month.
53. The Master by Ruling delivered on 8.11.2019 had, observed that that Defendant had sufficient reasons to seek an extension of time, but the refusal was due to sale and purchase agreement between prospective purchaser. Extension of time is discretionary remedy and cannot rely on single factor.

## CONCLUSION

There is delay of over six months, but considering circumstances of the case where the Defendant's grounds of appeal show more than arguable grounds for success extension of time for leave to appeal is granted. Defendant is also granted leave to appeal against the Master's decision delivered on 8.11.2019. Considering the circumstances of this case no costs are awarded for this application.

## FINAL ORDERS

- a. Defendant is granted extension of time to seek leave to appeal against Master's decision delivered on 8.11.2019.
- b. Leave to appeal is granted to appeal against the Master's decision delivered on 8.11.2019.
- c. No costs.

Dated at Suva this 24<sup>th</sup> day of July, 2020.



Justice Deepthi Amaratunga  
High Court, Suva