

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION (APPELLANT JURISDICTION)

High Court HPP Appeal Number 67 of 2021

AN APPEAL from the Decision of the Master to the Judge
of the high Court in the High Court HPP Action Number: 67
of 2022

IN THE MATTER of the ESTATE OF JAGDISHWARA
DATT SHARMA aka JAGDISHWAR DUTT SHARMA aka
JAGDISHWAR DUTT aka JAGDISHWAR DATT SHARMA
late of Caubati, Nasinu, Machine Operator, Deceased,
Intestate
(ESTATE)

AND

AVINESHWAR DUTT SHARMA of Takotoko, Navua, Fiji,
Religious Leader

(APPELLANT/APPLICANT/INTENDED ADMINISTRATOR)

BEFORE: Hon. Mr. Justice Vishwa Datt Sharma

COUNSEL: Mr Chand A. for the Applicant

DATE OF JUDGMENT: 25th January, 2023 @ 9.30 am.

JUDGMENT

[Summons for Leave to Appeal Out of Time]

Introduction

- [1] This is the Applicant/Intended Administrator's Summons filed pursuant to Order 59 Rule 10 [O59, R10] of the High Court Rules 1988 seeking for the following Orders:-

- (a) That the time within which a Notice of Intention to Appeal and Grounds of Appeal are to be filed be extended and the Appellant/Applicant do have leave and be at liberty to file an Appeal against the Ruling of the Honourable Master of the High Court delivered on the 22nd January 2020 whereby the Appellant/Applicant's Applicant was dismissed.
 - (b) Costs of the within application be in the cause.
 - (c) Such further and/or other reliefs or orders that this Honourable Court deems just an expedient.
- [2] The Summons is filed in support of an Affidavit deposed by Avineshwar Dutt Sharma.
- [3] The Applicant filed its written submission to Court.

Background

- [4] The Applicant filed an Ex-Parte Originating Summons on 6th October 2021 together with an Affidavit in Support and sought for an Order to appoint Avineshwar Dutt Sharma as the Administrator in the Estate of Jagdishwar Dutt Sharma aka Jagdishwar Dutt Sharma.
- [5] The Application was heard and determined by the Master of the Court and a Judgment delivered on 21st January 2022 wherein the Master decided that the Applicant had failed to establish that the paternity of the father was admitted by the deceased or established against the deceased by the Court whilst the deceased was living hence the Application fails and is dismissed.
- [6] The Applicant was dissatisfied by the finding of the Master and thus has filed a Summons seeking an Order to Appeal the Judgment Out of Time.

Determination

- [7] Firstly, the Summons seeks for Leave to Appeal the final judgment of the Master out of time to be granted notwithstanding that the time limited by the High Court Rules has expired.
- [8] It should be borne in mind that the Applicant has made the application pursuant to Order 55 and Order 59 Rule 10 of the High Court Rules 1988.
- [9] In relation to an appeal from the Final Order or Judgment of the Master, Order 59 Rule 8(1) & (2) of the High Court Rules 1988 provides 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 the single judge of the High Court which may be granted or refused upon the papers filed"

- [10] The time period within which such an appeal should be made is stipulated in Order 59 Rule 9 of the High

Court Rules 1988 as follows:-

"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".*

- [11] With regard to the extension of time for filing and serving a notice of appeal or cross appeal, Order 59 Rule 10(1) provides as follows:-

"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"

- [12] The only specific statutory provision available to Appeal Out of Time [Extension of time to Appeal] is Order 59 Rule 11, which should be sought after the persons who are entitled to make an appeal in relation to final orders or judgment as provided for in Order 59 Rule 8(1) in case they have not exercised this right within the stipulated period for valid reasons.

- [13] Order 59 Rule 10 of the High Court Rules 1988 empowers this Court to enlarge and/or extend the timeframe for filing and serving a Notice of Appeal or Cross Appeal and not the timeframe for filing and serving the Application for Leave to Appeal.

- [14] The governing principles for the granting of Leave to Appeal Out of Time are as follows:-

- (i) Length of Delay
- (ii) Reason for the Delay
- (iii) Chance of Appeal succeeding if time for Appeal is extended, and
- (iv) Degree of prejudice to the Respondent if application is granted.

(i) Length of Delay and (ii) Reason for Delay

- [15] The Judgment by the Master was delivered on 21st January 2022.
- [16] The Summons to Appeal Out of Time was filed on 23rd May 2022, after a lapse of 4 months from the date of Judgment.
- [17] The Applicant explains both the length of the delay and the reasons for the delay in his Affidavit from paragraph 7 onwards and is acceptable to this Honourable Court.

(iii) **Chance of Appeal succeeding and (iv) Degree of Prejudice to the Respondent**

[18] Notably, there is no Respondent to the proceedings and hence there will be no prejudice to any other party.

[19] The Applicant before the Master of the Court sought for an Order to appoint him as the Administrator for the Deceased Estate of Jagdishwar Datt Sharma.

[20] He informed Court that he is the only biological child of the Deceased and thus entitled to claim interest in the Deceased's Estate including a sum of \$190,000 sitting in the Deceased's Account at ANZ Bank.

[21] The Applicant submitted to this Court that he wishes to introduce new evidence and quoted the case authority *In re Khan's Shopping Company Ltd* [2005] FJHC 455; HBE 0039,2004 wherein Justice Singh stated that the principles on which new evidence is admissible on appeal, the three (3) conditions that must be satisfied are as follows:-

(i) That the evidence could not have been obtained with reasonable diligence or use at trial;

(ii) That the evidence must be such that it was likely to have importance influence though not decisive influence on the outcome of the case.

(iii) It must be credible evidence.

[22] The Applicant wishes to introduce the following new evidence:-

(i) His Birth Certificate [Annexure 5 of the Affidavit in Support]

(ii) Statutory Declaration [Annexure 4 in the Affidavit in Support]

(iii) High School Results [Annexure 1 in the Affidavit in Support].

In Conclusion

[23] The Judgment delivered by the Master on 21st January 2022 is a final Judgment and/or Order.

[24] The Applicant intends to introduce new evidence to Court in order to establish that he is the child of the Deceased, Jagdishwar Datt Sharma.

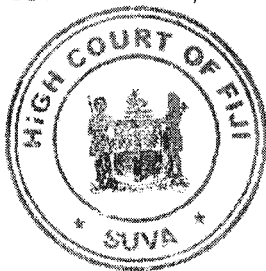
[25] Further, whether the new evidence brought before this Court will be credible in nature or not and/or if it has any important influence, is yet to be seen.

[26] In light of above rationale, it is only prudent and appropriate that I accede to the Applicant's Application and grant him Leave to Appeal Out of Time of Master's Decision delivered on 21st January 2022.

Final Outcome

- A. The Summons for Leave to Appeal Out of Time is accordingly granted.
- B. The Applicant to comply with the necessary subsequent cause in terms of the High Court Rules, 1988 accordingly.

DATED at SUVA this 25th day of January, 2023.



A handwritten signature in black ink, consisting of stylized initials and a surname.

VISHWA DATT SHARMA
JUDGE

CC. AMRIT CHAND LAWYERS, NABUA.