

**IN THE HIGH COURT OF FIJI  
(WESTERN DIVISION) AT LAUTOKA  
CIVIL JURISDICTION**

**CIVIL ACTION NO. HBC 208 OF 2011**

**BETWEEN** : **APIMELEKI KUNAVULA, SAVENACA WAINICAGI, ISAIA GONEWAI (Snr)** all of Korotoga, Sigatoka, self-employed, and **PITA KEWA NACUVA** retired civil servant of Suva, Fiji being the trustees of the Mataqali Naboka

**PLAINTIFF**

**AND** : **RUKSHANA BIBI KHAN** of Korotoga, Sigatoka, Businesswoman

**DEFENDANT**

**BEFORE** : Hon. Mr. Justice Mohamed Mackie.

**APPEARANCES** : Ms. A. Chand, on instructions, for the Plaintiff.  
Mr. I. Fa, for the Defendant.

**WRITTEN SUBMISSIONS:** By the Defendant filed on 01st November 2023.  
By the Plaintiff filed on 29th November 2023.

**HEARING** : 1<sup>st</sup> November, 2023.

**DATE OF DECISION** : 20<sup>th</sup> February, 2024.

**RULING**

**A. INTRODUCTION:**

1. Before me is a Summons filed on 17<sup>th</sup> April 2023 by the Plaintiff, pursuant to Order 2 Rule 1 and Order 3 Rule 4 of the High Court Rule 1988, seeking for following orders;

A. *That the Plaintiff be granted an extension of time to appeal the learned Master's decision of 20<sup>th</sup> June 2020, (should be read as 5<sup>th</sup> June 2020)*

B. *The costs of this application be costs in the cause.*

2. The Summons is supported by an Affidavit sworn by the 2<sup>nd</sup> named Plaintiff on 30<sup>th</sup> March 2023 and filed with the annexures marked as "A" and "B".

The annexure "A" referred to above is a Ruling pronounced by my predecessor judge on 18th November 2020 granting orders, inter alia, leave to Appeal the Master's Ruling

pronounced on 5<sup>th</sup> June 2019, by which the Plaintiff's action had been struck out pursuant Order 25 Rule 9 of the High Court rule 1988.

The annexure "B" referred to above is a Ruling pronounced by me on 24<sup>th</sup> February 2023, dismissing the Plaintiff's Application to have the Appeal reinstated, which was deemed abandoned due to the failure on the part of the Plaintiff's Solicitors to file and serve Summons for direction pursuant Order 59 Rule 17 (2) of the High Court Rule. As a result, Rule 17 (3) thereof came into operation and the Appeal stood abandoned.

It is after the dismissal of the Plaintiff's Application for reinstatement of the Appeal by my said ruling, the Plaintiffs have chosen to file the Summons in hand.

3. Opposing the Summons, the Defendant has filed her Affidavit in opposition on 11<sup>th</sup> October 2023. At the hearing, counsel for both parties have made oral submissions, and filed written submissions as well, for which I am thankful.

**B. HISTORY IN BRIEF:**

4. For the purpose of clarity and easy comprehension, the history of the case is narrated as follows.
  - a. On 16<sup>th</sup> December 2011, the Plaintiffs filed their Originating summons seeking reliefs, inter alia, the vacant possession of the properties comprised in Certificates of Title Numbers 7358 and 7317 being lots 29 and 30 respectively on the deposit plan 1143.
  - b. After hearing the matter, by judgment dated 24<sup>th</sup> April 2014, orders as prayed for in the Originating Summons were granted, with a further order referring the matter to the Hon. Master (the Master) for the adjudication of general damages and the indemnity costs payable to the Plaintiffs.
  - c. Being dissatisfied with the judgment, the Defendant preferred an Appeal, and the Court of Appeal by its Judgment dated 27<sup>th</sup> May 2016 made orders, inter alia, allowing the Appeal, by setting aside the judgment of the High court and ordering the action to commence and continue as a writ action.
  - d. The Plaintiffs, filed an Appeal to the Supreme Court and finally by judgment dated 21<sup>st</sup> July 2017 the Appeal was allowed by setting aside the Court of Appeal Judgment and reinstating the judgment of the High court.
  - e. In the meantime, Plaintiffs had filed a Statement of claim on 17<sup>th</sup> May 2017 pursuant to the Court of Appeal Judgment and it was pending before the Master for the pre-trial formalities. However, since the Supreme Court by its Judgment dated 21<sup>st</sup> July 2017 had allowed the Plaintiffs' Appeal and reinstated the High court judgment, what was left to be done before the Master was the assessment of damages and indemnity costs as per the judgment of the High Court.

- f. The Master, having observed the non-appearance of the Counsel/Solicitors for the parties on 25<sup>th</sup> August 2017 and on 8<sup>th</sup> September 2017, took the matter out of the cause list on 8<sup>th</sup> September 2017. Thereafter, notice being issued under Order 25 rule 9 on his own motion and filing of a “Show Cause” Affidavit by the Plaintiffs’ Solicitors, despite the Master being informed by the Plaintiffs’ counsel on 28<sup>th</sup> of August 2019 that Bill of Costs was already filed and the Order 25 rule 9 will have no application, the Master by his impugned Ruling dated 5<sup>th</sup> June 2020 struck out the Plaintiffs’ action.
- g. Being dissatisfied with, the Plaintiffs on 16<sup>th</sup> June 2020 moved the Court for leave to Appeal the Master’s said decision, and my predecessor, after hearing the matter, by his decision dated 18<sup>th</sup> November 2020 made Orders, inter alia, granting leave to Appeal, and to file and serve the Appeal within 7 days from the date of granting leave (ie 18<sup>th</sup> November 2020), which the Plaintiffs’ Solicitors duly complied with.
- h. However, since no Summons for direction was filed and served pursuant to Order 59 Rule 17 (2), the Appeal became abandoned in terms of Rule 17 (3) thereof. Though, the plaintiffs filed an Application before me for the reinstatement of the Appeal, it became a futile exercise. Thus, the present Application is before this Court for the extension of time for the Appeal.

**C. ANALYSIS:**

5. At the outset, let me venture into the High Court Rules relied on by the Plaintiffs for the purpose of this Application. Neither Order 59 rule 8(1) nor Order 59 rule 10(1) allows the High Court to grant extension of time for leave to appeal against an interlocutory decision. The Order 59 rule 11 deals with the leave to appeal and there is no mention of enlargement of time or regarding such application for enlargement of time.
6. Learned Counsel for the Defendant neither disputed the reliance of the Plaintiffs on the Orders and Rules stated in the summons nor pointed out any law which specifically deals with the matter in hand. It is the general provision contained in Order 3 rule 4 of the High Court Rules of 1988 that should be relied on for the Summons filed on 17<sup>th</sup> April 2023 by the Plaintiff seeking extension of time to appeal against the Master’s Ruling dated 5<sup>th</sup> June 2020.
7. The Order 3 rule 4 of the High Court Rules of 1988 applies. 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’.*
8. By the Summons filed on 17<sup>th</sup> April 2023, the substantial relief sought by the plaintiff was the extension of time in terms Order 3 rule 4(1). The Plaintiffs had in fact on 18<sup>th</sup> November 2020 obtained from my predecessor orders, inter alia, for leave to Appeal and had filed and served the Notice and Grounds of Appeal. Accordingly, it was when the

matter stood fixed to be mentioned on 12<sup>th</sup> February 2021 to set a date for Appeal hearing, the Plaintiffs' Solicitors found that all the efforts they had taken till that point of time had gone down the drain owing to their failure to file and serve Summons for direction in terms of Order 59 Rule 17 (2) and the Appeal had become abandoned as a result.

9. It was in order to remedy the said failure, the Plaintiffs' Solicitors on 28<sup>th</sup> January 2021 filed the ill-fated Summons for the reinstatement of the Appeal, which did not bring solace to the Plaintiffs, who then resorted to file this Application in hand.
10. Thus, it is very clear that there was no any sort of delay on the part of the Plaintiffs during this process as the current Application was filed when the Defendants were already in court and when the matter was to be mentioned on 12<sup>th</sup> February 2021 to fix the hearing of the Appeal.
11. So, the question of delay need not be an issue to be gone into in relation to the current Application. It is only on the propriety of the, admitted, failure on the part of the Plaintiffs' Solicitors to file and serve the Summons for direction in order to prosecute the Appeal, which this court has to go into now.
12. Hon. Amarathunga- J in **Veilave v Naicker [2017] FJHC 131; HBC159.2013 (17 February 2017)** , inter alia, had the following to say

*"15. It is an exercise of discretion of the court, and there can only be guide lines and rigid rules may curtail the exercise of the discretion of the court and may result injustice and curtail the access to justice on mere technicalities leaving the pertinent legal issues (merits) high and dry. In my opinion though the rules of the court needed to be followed the discretion of the court should not be in favour of dismissal of a matter when there are merits. There are obviously, differences of opinion on the said 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 and in many instances there will be some form mistake or fault on the part of the solicitor. If a mistake of lawyer is excluded as a reason, many a deserving and meritorious application may be dismissed. Though it may be a path of least resistance to dispose numerous applications for extension of time , I am not inclined to take that path. In my judgment such an approach would also not be in accordance with Section 15 of the Constitution of Fiji. The access to justice should not be denied unless there is specific impediments where discretion of the court is denied or curtailed e.g. Limitation Act (Cap 35)."*

13. His Lordship also in paragraph 16 had cited the authority in **Emanuel v Australian Securitas Commission [1997] HCA 20; 144 ALR 359** wherein Kirby J had stated,

*"In many cases which depend upon the meaning of legislation found to be ambiguous, strong arguments can be assembled for the competing points of view. So it has proved in this appeal. We deceive ourselves in such cases if we pretend that there is only one available interpretation. The judicial task is to seek out and to declare the preferable construction of the legislation. Only then does it become the one interpretation which the law holds to be correct."*

14. In **Veilave v Naicker**\_Supra, his Lordship stated further;

*“17. There are judgments of the this court as well as Fiji Court of Appeal and even Supreme Court of Fiji dealing with the non-compliance of rules relating to Leave to Appeal . If one considers all of them they may not be coherent and there may be some difficulty in reconciling. I do not propose to venture such an exercise in this decision, **but suffice to state discretion granted to High Court in Order 3 rule 4 of the High Court, is unfettered”.** (emphasis mine)*

15. Learned counsel for the Defendant did not dispute the power of the Court to extend the time period for leave to appeal.(i.e. against interlocutory order). His main concern was the alleged delay and the prejudice to the Defendant. As I alluded to in a foregoing paragraph, there is no delay involved in relation to the application in hand. His allegation about the delay in proceedings before the Master, which was in fact in relation to the period of the alleged inaction on the part of the Plaintiffs, has to be gone into at the substantial hearing of the Appeal in order to decide the propriety of the Master’s impugned Ruling dated 5<sup>th</sup> June 2019.

16. I agree with Amarathunga- J, who had pointed out in paragraph 19 of **Vaileve v Naicker** supra

*“19. Interlocutory orders were often made while the action was pending before the court and finality to orders of the court are essential for progress of the trial. This reasoning will not be always used to all the interlocutory decisions, when the classification is based on Fiji Court of Appeal Case Goundarv Minister for Health (supra). Some interlocutory decisions will have final effect, though they are classified as interlocutory. A good example is this case. There is no pending action in the court after interlocutory Ruling delivered on 11.11.2016.”*

17. The above observation suits the case in hand as well. The reason being, there is no pending action in the court after interlocutory Ruling was delivered by the Master on 5<sup>th</sup> June 2019 by striking out the action and the doors of the Court remain finally closed for the Plaintiffs, unless this Court intervenes by the extension of the time for Appeal, having considered the nature of the failure, admittedly, occurred on the part of the Plaintiffs’ Solicitors and the circumstances that led to such failure.

18. The fact that the action hereof for substantial relief of vacant possession had already come to an end with the Supreme Court final judgment entered on 21<sup>st</sup> July 2017 and only pending matter was the assessment of indemnity costs, seems to have had escaped the attention of the Master at the time the impugned Ruling was made. The Master by Ruling delivered on 05<sup>th</sup> June 2019 had struck off the action acting under Order 25 Rule 9.

19. In the exercise of my discretion the decisions of the parallel Courts and higher forums are used as a guide line, though they are not exhaustive, but at the same time mindful of the recent trends in regard to failure to comply the procedural requirements or technicalities.

20. There cannot be rigid law preventing the exercise of the court's discretion on a matter which will deny a party its right to come before the court, if there is some injustice. This is specially so, if an action is struck off before hearing for non-compliance of a requirement that could be cured through an amendment and/ or an enlargement of time.
21. In the exercise of my discretion under Order 3 rule 4(1) of the High Court Rules of 1988, I have the power to enlarge the time period for an application for Leave to Appeal against the Master's Ruling dated 05<sup>th</sup> June 2019 .I have considered the guiding principles laid in the exercise of general discretion in Order 3 rule 4(1) (analogous to O.3 r.5 of R.S.C UK).
22. In **Wakaya vs Chambers et al (unreported) (decided on 10th 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)
23. The paramount consideration is the resultant injustice to the party seeking leave and merits of the appeal grounds.
24. The Solicitors for the Plaintiffs hereof had duly filed and served notice and grounds of Appeal within the stipulated time period by the Ruling dated 18<sup>th</sup> November 2020 made granting leave to Appeal. There was no any specific direction in the said ruling about filing and servicing of the Summons for direction pursuant to Order 59 Rule 17 (2).
25. Subsequently, having realized the failure on their part to file Summons for direction and the result abandonment, of Appeal the Plaintiffs' Solicitors, without even waiting for the next mention date, ie on 12<sup>th</sup> February 2021, filed papers for the reinstatement. Thereafter, when this Court dismissed the Application for the, reinstatement on 24<sup>th</sup> February 2023 , the Plaintiffs on 17<sup>th</sup> April 2023 filed the present Summons for the extension of time to Appeal after around 51 days from my Ruling dated 24<sup>th</sup> February 2023.
26. No any rigid rule was brought to my notice to the effect that the delay and/or failure of the Solicitor in an instance of this nature should be seriously dealt with. There is established jurisprudence in Fiji as well as in UK that the paramount consideration in extension of time and or leave is merits, though some explanation as to delay is needed.

### **Grounds of Appeal:-**

27. The grounds of appeal as stated in the Notice of Appeal are as follows.
1. *The learned Master erred in striking out the cause for want of prosecution and abuse of process of the Court.*
  2. *The learned Master erred by not complying with the Orders of the High Court entered on 24<sup>th</sup> April 2014 and the Supreme court entered on 21<sup>st</sup> July 2017 by assessing the indemnity costs of the Plaintiffs.*
  3. *The learned Master erred by failing to consider that Order 25 Rule 9 did not apply as the Final Judgment had been entered in the matter on 24<sup>th</sup> April 2014 and affirmed by the Supreme Court on 21<sup>st</sup> July 2017.*
  4. *The learned Master erred in law by interpreting the Order 25 Rule 9 imposes a rebuttable onus on the Plaintiffs.*
28. I do not propose to deal with the aforesaid grounds in detail, but suffice to consider whether any merit is there in the proposed grounds at least regarding to the appeal ground dealing with the Order 25 Rule 9.
29. Though not exhaustive in the exercise of discretion under Order 3 rule 4 of High Court Rules 1988, the following may be considered and their cumulative effect is taken and they are;
- a. The interests of justice and specially the failure to exercise the power of extension and consequences. Eg. If the failure to enlarge time would result denial of access to a party.
  - b. Whether the application for extension has been made promptly.
  - c. Whether the failure to comply was intentional, for e.g. non-compliance of unless order or after an extension of time delaying taking further steps.
  - d. Whether there is a good explanation for the failure.
  - e. The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.
  - f. whether the failure was caused by the party or his legal representatives. E.g. mistake of law or fact
  - g. Effect of extension have on the trial, if the action is still pending before the court.,
  - h. The effect which the failure as opposed to granting extension, on all the parties including interest of public if any.
  - i. If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.
  - j. The effect of extension on case management and right of a party for determination of a civil action without delay.
  - k. Whether the defect is curable, and if so the prejudice to other party.

30. It is my considered view, the answers to all the above questions appear to be favoring the Plaintiffs. It is also my view that the discretion of the this court can be utilized to extend the time period for the leave to appeal against the impugned decision for following reasons;
- i. It was due to an unintentional failure and inadvertency on the part of the Solicitors for the Plaintiffs, the Summons for direction was not filed and served in terms of Order 59 Rule 17 (2).
  - j. The Summons for the aborted reinstatement was filed of time soon after the realization of the fault on their part.
  - k. The Summons in hand for extension of time was filed within a reasonable period of 52 days. Though, I am wrong on this point, the merits of the case warrant the extension.
  - l. The access to justice should not be restricted solely, due to a mistake of law by the solicitors in the circumstances of this case.
  - m. The reason adduced by the Defendant in her Affidavit in opposition to show that she will be prejudiced as she has no funds cannot be accepted, until she faces the means Test.
  - n. There is no delay on the part of the Plaintiffs as far as the present proceedings are concerned.
  - o. If the extension is not granted the Plaintiff's action remains struck off.
31. The delay or a mistake or a failure on the part of the solicitor can be directly attributable to the Plaintiff, but it cannot be considered an abuse of process in the present context.
32. The appellate courts have found it useful to consider the discretion to enlarge by looking at 5 factors. They are:
- (i) The reason for the failure to file within time
  - ii) The length of the delay
  - (iii) Whether there is a ground of merit justifying the appellate court's consideration.
  - iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
  - (v) If time is enlarged, will the Respondent be unfairly prejudiced?

**Reasons for failure to file within time**

33. The failure on the part of the Plaintiffs' Solicitors to file and Serve the summons for direction as per Rule 17(2) is admitted. The lawyer's inadvertent mistake or failure to file and serve the summons for direction, while they have duly followed other requirements, should not be held against the Plaintiff, if there are merits in the proposed grounds of appeal and his appeal rights should not solely depended on the failure occurred on the part of their Solicitors.



### **Whether there are merits on the Appeal**

34. In my judgment this is the foremost decisive factor in the extension of time. The weight given for this factor in the final determination of the extension is relatively high, though other factors are also considered. In my opinion, even if there are good reasons for delay and/ or failure and no prejudice to the other party, if the appeal lacks merits no extension should be granted as it will only add additional costs and uncertainty to the parties. On the other hand, even though the reason adduced for the delay and/or the failure are unsatisfactory, if the merits warrants, the Court should not hesitate to exercise its discretionary power to extend the time for Appeal.

### **If the time is enlarged whether there will be prejudice?**

35. The Defendant in her Affidavit in opposition states about the prejudice she would face if the Plaintiffs are successful in this application. She alleges that the Plaintiffs had five years' time to enforce the Judgment since the Supreme Court reinstated the High court Judgment in the year 2017. She also avers that if the extension is granted she will be greatly prejudiced as her financial situation has changed. She adds further that the failure to enforce the judgment for 5 years and the failure to file and sever the Summons for direction are the Plaintiffs' own doing and she should not be punished for the same. The execution of a judgment is an inevitable consequence in the due process of law and cannot be a reason to deny a party's right to meritorious appeal. The extension of time cannot prejudice the Defendant though she was successful initially, as the proposed grounds of appeal are not without merit.
36. In **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 020 of 2009 (3 February 2010)** the court the Fiji Court of Appeal stated:-

*"It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal"*

37. The above passage suggests that a party's right of appeal exists while time runs for the filing of the requisite appeal documents. Once time runs out, that right is extinguished. It then becomes a matter of judicial discretion whether or not to grant leave to appeal out of time. That discretion must still be exercised judicially.
38. Expecting the strict compliance of the rules on time limit, in view of the circumstances of this case, is undesirable and showing some leniency using the discretion of the Court in extending the time limit would serve to achieve the ends of justice, provided that the

Plaintiffs have good, convincing and arguable grounds for Appeal, which the Plaintiffs have demonstrated to be existing. In my view, this will not prejudice the Defendant.

39. Considering the circumstances and the reason adduced for the failure to file and serve the Summons for direction and, above all, bearing in mind the merits of the grounds of Appeal advanced by the Plaintiffs, I decide to grant an extension of time to Appeal as prayed for in the summons.
40. Also having considered the circumstances of the case, I do not wish to make any order as to costs, and each party should bear their own costs.

**D. FINAL ORDERS:**

1. The Plaintiffs are granted an extension of time to Appeal the learned Master's decision made on 5<sup>th</sup> June 2019.
2. The Plaintiffs shall adhere to the relevant Orders and Rules of the High Court rules in relation to their intended Appeal against the said Ruling.
3. No costs ordered and the parties shall bear their own costs.



  
A.M. Mohamed Mackie  
Judge

At High Court Lautoka this 20<sup>th</sup> day of February, 2024.

**SOLICITORS:**

**For the Plaintiff:**

**Messrs. Parshotam Lawyers, Barristers & Solicitors.**

**For the Defendant:**

**Messrs. Fa & Company, Barristers & Solicitors.**