

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

**Civil Action No. HBC 275 of 2019 (Lautoka)**

**BETWEEN:** **DESHWAR KISHORE DUTT** of Maximum Correctional Centre, Naboro Prisons.

**RESPONDENT/ PLAINTIFF**

**AND:** **SAKEASI VEVIWILI** Former Supervisor, Fiji Corrections Services, Western Division.

**APPLICANT/ 1<sup>st</sup> DEFENDANT**

**AND:** **MELI TAITO** Former Chief Operating Officer, Natabua Correction Centre.

**APPLICANT/ 2<sup>nd</sup> DEFENDANT**

**AND:** **FRANCIS BULEWA KEAN** Commissioner Fiji Corrections Services.

**APPLICANT/ 3<sup>rd</sup> DEFENDANT**

**AND:** **THE ATTORNEY GENERAL OF FIJI.**

**APPLICANT/ 4<sup>th</sup> DEFENDANT**

**Appearance:**

**Plaintiff/Respondent – In Person.**

**For the 1<sup>st</sup> to the 4<sup>th</sup> Defendant/Applicant – Mr V. Ram (Attorney-General's Office).**

**Date of Hearing: 26<sup>th</sup> March 2024**

**RULING**

**A. Introduction**

[1] Before me is a summons for extension of time and leave to appeal filed by the Attorney-General's Office on behalf of the Defendants/Applicants for an interlocutory ruling of the Learned Master delivered on 15<sup>th</sup> August 2023. The summons are accompanied by an affidavit in support of Isireli Nataqa of Fiji Corrections Service. The summons were filed on 6<sup>th</sup> February 2024. When the summons was called for hearing the Plaintiff/Respondent informed me that he was not served the summons,

however he had received the affidavit and he sought 7 days to respond. The Plaintiff/Respondent was provided a copy of the summons and given 7 days to respond, while the Applicants were given 3 days to reply. The Plaintiff/Respondent filed his response on 25<sup>th</sup> March 2024.

**B. Brief History**

[2] The Plaintiff/Respondent on 23<sup>rd</sup> October 2019 filed a Writ of Summons at the Lautoka High Court against the 4 Defendants/Applicants seeking damages and costs for wrongful confinement. The Plaintiff claims that the Defendants failed to release him upon the expiry of his non-parole term. The Defendants filed an acknowledgement of service on 15<sup>th</sup> November 2019. The statement of defence of the Defendants was filed on 12<sup>th</sup> December 2019. On 25<sup>th</sup> November 2020 the matter was transferred to Suva by the Master with the consent of the parties. A summons to strike out was filed by AG's Office on 30<sup>th</sup> March 2022. The Learned Master dealt with the application and delivered her Ruling on 15<sup>th</sup> August 2023.

**C. The Relevant Laws**

[3] The relevant Rules relating to the application (leave to appeal and extension of time) are contained in **Order 59** of the High Court Rules 1988 and are as follows-

*Appeal from Master's decision (O.59, r.8)*

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.

*Time for appealing (O.59, r.9)*

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.

*Extension of time (O.59, r.10)*

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.

*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 a supporting affidavit, filed and served within 14 days of the delivery of the order or judgment.

- [4] The other relevant Rule is **Order 3 rule 4** of the High Court Rules. It gives the court discretion and provides for extension of time.

*Extension, etc., of time (O.3, r.4)*

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 authorised by these rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

- [5] Over period of time our Courts have developed a number of case laws on extension of time and leave to appeal out of time. In *Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3; Miscellaneous Case 20 of 2009 (3 February 2010)* the Fiji Court of Appeal stated that:

*"[12.] 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 appellants 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.*

*[13.] In *Ist Deo Maharaj v. Burns Philip (South Sea) Company Ltd, Civil Appeal No. ABU0051 of 1994S* citing the judgment of *Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880 CA* it was said:-*

*"The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:*

*(a) the length of the delay;*

*(b) the reasons for the delay;*

*(c) the chances of succeeding if time for appealing is extended; and*

*(d) the degree of prejudice to the Respondent if the application is granted."*

[14.] In *Avery v Public Services Appeal Board (No.2) (1973) 2 NZLR 86* it was said:

*"Everything is left to the discretion of the court on wide basis that leave may be granted in such cases as 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."*

**D. Discussion**

[6] I would now go over the factors and firstly look at the **reasons for failure to file within time and the length of time (delay)**. The reasons for the delay and the length of delay by the Applicant/Defendants are contained in the affidavit of Isireli Nataqa in paragraphs 10 to 13 as follows:

*"10. Upon receipt of the ruling, the counsel in carriage of this matter informed the Appellants of the outcome.*

*(a) The Appellants reverted to the counsel in carriage a month late to have a meeting to discuss its options and way forward.*

*(b) It was discussed during the meeting that since the outcome was not in favour of the Appellants, approval should be sought from the FCS Commissioner to appeal the decision of the Learned Master; and*

*(c) By then, the time frame to file appeal had lapsed.*

*11. The Appellants also took into consideration the effects of the Ruling and the effects it would have, in particular in regards to the calculation of the remission period.*

*12. Upon receipt of the approval from FCS Commissioner, the counsel in carriage of the matter, drafted the appeal documents. The draft appeal documents were then sent to FCS for review. Upon receiving the reviewed appeal documents, the counsel in carriage finalized the appeal documents for filing.*

*13. There has been a delay of approximately 5 months since the time limited for filing the application for leave to appeal is 14 days. The reasons for the delay are explained above."*

[7] In response the Plaintiff/Respondent stated:

*"24. The respondent respectfully submits that:*

*(1) the officer in carriage was from one of the biggest law firms in Fiji and being a lawyer knew very well that the time-frame of filing appeal was 14 days, not 170 days – as is evident through Mr. Isireli Nataqa's affidavit, para 13;*

*(2) being a lawyer himself, he was not obliged under any written law to seek the FCS Commissioners approval in filing a timely appeal for he was appointed as counsel for all the appellants and not vice versa; if anything;*

(3) *if Mr. Nataqa's affidavit is to be believed then the question one needs to ask itself is why it took one month to hold a meeting to resolve such an important issue which Mr. Nataqa now labels as 'Public Importance' in para 15 of his affidavit; and*

(4) *that if a meeting was indeed held and the matter discussed with the appellants and their counsel A MONTH LATER then why it took the counsel another 142 DAYS (4 Months 22 days) to draft a 2 PAGE proposed notice and grounds of appeal consisting ONLY 2500 words?, and appeal could have been drafted within hours! Sought for approval within the same day and by afternoon filed in the Registry – But NO! it took 5 Months 22 days to get 2pg document approved and filed!”*

[8] It is evident from the affidavit of Mr. Nataqa that the Defendant/Applicants were promptly informed of the Learned Masters decision. They responded a month later. They then sought the FCS Commissioners approval. Which took some more time. What was required to be done within 14 days took over 5 months. The reasons advanced for the Defendants/Applicants are unconvincing. The Fiji Corrections Service (FCS) which is involved in calculation of time, must act in a timely manner. The Plaintiff/Respondent is serving time. He is challenging the length of time the Defendants/Applicant have retained him in Correction facilities. I might show leniency using the discretion of the Court in extending the time limit if it would serve to achieve the ends of justice and provided the Defendants/Applicants have good, convincing and arguable grounds of appeal.

[9] The other factor is the merits of the appeal. The Defendants/Applicant proposed grounds of appeal are as follows:

“ 1. **THAT** *the Learned Master of the High Court ('Learned Master') erred in law at paragraph 6 of the Ruling in holding that the issue to determine is what remission was to be applied and whether the officer in charge forfeited the Plaintiff's right to remission under Regulation 18 of the Corrections Service Regulation 2011.*

2. **THAT** *the Learned Master at Paragraph 16, erred in law and in fact in deciding that the claim by the Respondent is not an abuse of process of the court process when in fact the Defendants exercised lawful authority to confine the Plaintiff under committal warrant No. 213/15 on criminal case No. 338/12.*

3. **THAT** *the Learned Master at Paragraphs 14 and 17, erred in law and fact in misinterpreting section 27 of the Corrections Service (Amendment) Act 2009 and therefore incorrectly deciding that there is a cause of action by the Plaintiff when the Learned Master failed to consider:*

*(a) that following the case of Timo v. State; CAV 0022 of 2016, the views taken by the Supreme Court has been sanctioned by*

*legislative law, in particular section 27 (3), (4) and (5) of the Corrections Service Act 2006 ("Corrections Act");*

*(b) Section 27 (3) of the Corrections Act that where a sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, for the purpose of initial classification, the date of release for the prisoner shall be determined on the basis of one-third of the sentence not taking into account the non-parole period;*

*(c) Section 27 (4) of the Corrections Act that where the sentence of a prisoner includes a non-parole period fixed by a court in accordance with section 18 of the Sentencing and Penalties Act 2009, the prisoner must serve full term of the non-parole period; and*

*(d) Section 27 (5) of the Corrections Act whereby section 27 (3) and (4) (of the Corrections Act) apply to any sentence delivered before or after the commencement of the Corrections Service (Amendment) Act 2019."*

[10] As to the 1<sup>st</sup> proposed ground of appeal I note that the Learned Master stated in Paragraph 5 of her Ruling that "I do not find the Plaintiff is seeking redress under Section 44 of the Constitution but rather the claim by the Plaintiff is claim[ing] for damages in tort for wrongful confinement". Then the Learned Master proceeded to identify the issues to be determined by the Court in paragraph 6. I note that Section 44 (2) of the Constitution gives "*the right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.*" Section 44 (1) of the Constitution provides for constitutional redress. Subsection (2) of Section 44 gives a person the right to make an application as is before this court, any other action, in this instance being the filing of the writ of summons. The writ so filed is seeking damages for wrongful confinement, a tort.

[11] As to the 2<sup>nd</sup> proposed ground of appeal on the material before her, the Learned Master found that it was not an abuse of process where the Plaintiff was claiming damages for wrongful confinement. She correctly identified that it was not a matter for constitutional redress. The Defendants/Applicants did not make submissions on the first 2 proposed grounds of appeal. The third proposed ground of appeal by the Defendants/Applicants covers Section 27 of the Corrections Service Act 2009. The submission is that the Learned Master erred in misinterpreting the section. I find that the Learned Master was correct in her interpretation. The Learned Master took cue from *Timo v. State [2019] FJSC 22; CAV 22 of 2018* (delivered on 30<sup>th</sup> August 2019) the case which prompted the legislative changes. The other cases that followed were: *Nadan v. State [2019] FJSC 29; CAV 7 of 2019 (31<sup>st</sup> October 2019)*, *Kreimanis v. State [2023] FJSC; CAV 13 of 2020 (29<sup>th</sup> June 2023)* and *Ismail v. State [2023] FJSC; CAV 2 of 2022 (26<sup>th</sup> October 2023)*.

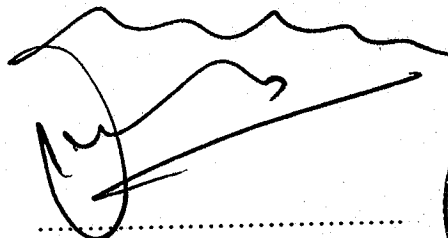
[12] I note paragraph 9 to 15 of the Ruling of the Learned Master. In those paragraph she set out the imprisonment term, the non-parole period, the calculation of the remission.

Based on the pleadings she found that one-third remission was to be applied to the full term of one year six months (18 months) imprisonment. The remission was 6 months. Deducting the remission and their being no forfeiture of the remission. The Plaintiff/Respondent was to be released in 12 months (1 year) and not 1 year 4 months (16 months) as calculated by the Defendants/Respondent. The Non Parole period was also 1 year. The Learned Master correctly applied the relevant laws. She did not err. The Third proposed ground does not have merit.

- [13] The threshold for merits for the application contained in the proposed grounds of appeal are not adequate to grant extension of time and also to grant leave to appeal. In my view if time is enlarged there will be prejudice to the Plaintiff/Respondent. This matter needs finality. All cases need to be determined within a reasonable time. It is close to 5 years that we have not dealt with the matter. Further delay of the matter is not in any ones interest. A delay of over 5 months in seeking extension of time and leave is long in these circumstances. In addition the proposed grounds of appeal do not have merit. Within this delayed period I note that summons to enter action for trial was filed on 31<sup>st</sup> October 2023. Copy pleadings were filed on 11<sup>th</sup> January 2024. On 6<sup>th</sup> February 2024 the Learned Master allocated the matter for trial. The summons for extension for time and leave was filed on 6<sup>th</sup> February 2024 which is the day on which the matter was to be set for trial. This matter can be promptly set for trial and determined.
- [14] The summons seeking extension of time and leave to appeal are dismissed. Cost in cause.

The **Court Orders** as follows:

- (a) The summons seeking extension of time and leave to appeal are dismissed.
- (b) Cost in cause.



Chaitanya Lakshman  
Puisne Judge  
23<sup>rd</sup> April 2024

