

IN THE HIGH COURT OF FIJI AT SUVA
CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HPP 75 of 2019

BETWEEN: **LOSALINI TAWATATAU aka LOSALINI TATATAU**
BIGGS

FIRST APPLICANT / PLAINTIFF

AND: **SAKIUSA MATEINAVUSO BUINIMASI, MERESEINI**
TAILASA SOVALU AND GRACE MATELITA
ULUDOLE DUNN

SECOND APPLICANTS/PLAINTIFFS

AND: **FIJI PUBLIC TRUSTEE CORPORATION LIMITED**

FIRST RESPONDENT/ DEFENDANTS

AND: **TOKASA BUINIMASI aka TOKASA KUBUNAQOLI**
BUINIMASI

SECOND RESPONDENT /DEFENDANT

AND: JEREMAIA BUINIMASI

THIRD RESPONDENT/DEFENDANT

AND: THE REGISTRAR OF TITLES

FOURTH RESPONDENT/DEFENDANT

AND: ATTORNEY GENERAL OF THE REPUBLIC OF FIJI

FIFTH RESPONDENT/ DEFENDANT

For the Applicant : Mr Faktaufon. V and Ms Faktaufon. V

For the First Respondents : Ms Radrole. E and Ms Silatolu. L

For the Second and Third Respondents: Mr Vulakouvaki. J

For the Fourth and Fifth Respondents : Ms. Qica. V

Date of Decision : 15 November 2024

Before : Waqainabete-Levaci, S.L.T.T, Puisne Judge

J U D G E M E N T

**(APPLICATION FOR LEAVE TO APPEAL OUT OF TIME AND FOR
ENLARGMENT OF TIME)**

PART A - BACKGROUND

1. This is an application by way of Summons seeking Leave to Appeal and Leave for Extension of Time the decision of the Master delivered on 1 August 2023 which was as follows:

11. This claim was filed on 04 October 2019 which is 04 months out the limitation period.

12. And if the cause of action was said to have accrued when a grant was issued for the Estate of Meli that is on 24 March 2004 or when the Deed was executed on 07 July 2004, the 12 year period expired on 20 March 2016 or alternatively on 07 July 2016.

13. Again, this claim was filed out of the limitation period.

14. Considering the above, I find that the Plaintiff's claim is statute barred under Section 10 of the Limitation Act.

15. Accordingly the writ of summons and statement claim filed herein is wholly dismissed."

2. The Summons seeks the following Orders:

1. The First and Second Applicants/Original First and Second Plaintiffs be granted leave to appeal the decision of the Master of the High Court, Suva, Ms Vandana Lal dated 1st of August 2023;
2. The First and Second Applicants/Original First and Second Plaintiffs be granted leave to appeal out of time the said decision of the Master of the High Court, Suva, Ms Vandana Lal wherein she made the following Orders:-
 - (i) That the Writ of Summons and the Statement of Claim filed herein is wholly dismissed;
 - (ii) That the Plaintiffs pay the Defendants costs assessed at \$800 for the Second and Third Defendants and \$200 for

the First Defendant and \$200 for the Fourth and Fifth Defendants. Said costs to be paid within 14 days of this ruling.

3. That there be an enlargement of time for the First and Second Applicants/Original First and Second Plaintiffs to appeal the said decision.
3. The Appellant/Plaintiffs rely on Order 59 Rule (1) sub-rule (1) and (2) and Rule 11 of the High Court Rules and inherent jurisdiction of the Court for the powers of the Court to be exercised to grant enlargement of time.

AFFIDAVIT

Applicant/Plaintiff's Affidavit

4. In support of the application for Leave to Appeal out of Time, the Applicant deposes an Affidavit which stated that the Writ of Summons was filed on 4 October 2019 and served between 16th to 30th of October 2019.
5. It is deposed that the Defendant/Respondents acknowledged service of the Writs from the 8th to the 27th of November 2019.
6. It is deposed that a Notice of Motion for Judgment in Default was entered on 23 June 2020 against the 1st Defendant/Respondent.
7. The solicitors for the 2nd and 3rd Defendants/Respondent filed their application for strike out on 28 May 2020 on the grounds that:
 - (i) The Writ be dismissed and struck out as there is no reasonable cause of action;
 - (ii) The Writ be dismissed and struck out for want of prosecution.
 - (iii) That the writ filed herein be struck out as it is time barred.
8. In response to the Affidavit in support of striking out, the Plaintiff/Applicants filed an Affidavit in opposition on 18 August 2020 and duly served on all Defendants/Respondents.
9. The Applicant/Plaintiff deposes that the reason for seeking enlargement of time is that after the Ruling was delivered on 1 August 2023, the

Applicant/Plaintiff was notified on 2nd August 2023 and correspondences was made between the Counsel and the Applicant/Plaintiff until after 14 days that there were instructions to proceed to appeal.

10. The current application is filed 73 days after the Masters Ruling and hence the reason the Applicant/Plaintiff seeks Leave for Enlargement of Time to Appeal is because consent had to be obtained from the other Applicants/Plaintiffs together with the First Applicant/Plaintiffs decision.
11. That Applicant/Plaintiff deposed that residing overseas has meant further delays in the preparation and execution of documents for filing purposes.
12. That the decision of the Master would prejudice the Applicant/Plaintiff is leave is not granted as the Master did not properly analyze the Claim.

First Respondent/Defendants Affidavit in Opposition

13. The First Respondent/Defendant through their authorized acting Manager of Estates deposed that the application is filed 240 days out of time and that it discloses no reasonable cause of action.

Third Respondents/Defendants Affidavit in Opposition

14. The Third Respondent/Defendant deposes the Affidavit under a Power of Attorney for and on behalf of himself and for the Second Respondent/Defendant. The Court is satisfied that the Power of Attorney is authentic and empowers the Third Respondent/Defendant to depose on their behalf.
15. The Third Respondent/Defendant deposes that the Appeal is now out of time by 265 days and that instructions should be have given to the solicitors within the timelines to allow Counsel to file the necessary papers for Appeal.
16. They depose that the current Affidavit in Support of the Application for Leave to Appeal Out of Time was deposed in Fiji before a local Solicitor and hence the Applicant/Plaintiff should not mislead the Court that they find it difficult to notarise and courier legal documents to Fiji.
17. The application for leave to appeal will deny the Respondent/Defendants the fruit of their judgment and find no error in the decision that was made as the action by the Plaintiff/Applicant was statute barred.

Affidavit in Reply to the Affidavit in opposition

18. The Applicant/Plaintiff deposed that she continued to reside overseas and she had been couriered the documents which were to be notarized. Given the expenses, the Applicant/Plaintiff opted to accompany the documents back to Fiji to have it witnessed before a local Solicitor.
19. She deposed that there was an initial application for Stay pending Appeal filed into Court on 4th April 2024, however on directives from the Judge, the matter was withdrawn and this Leave to Appeal application was filed. According to the Court of Appeal Registry, the calculation of days was 73 and not 265.
20. She deposes that she admits there was fraud as the witnessing solicitor had not seen or explained the contents of the Deed of Arrangement.

SUBMISSIONS

21. The Applicant/Plaintiffs admit that the delay is 265 days but that 73 days out of this was to await the Applicant/Plaintiff's instructions to Appeal and that the balance of those days were administrative matters pertaining to consent from all other Applicant/Plaintiffs.
22. Reference was made to United Coach Builders Limited -v- Satya Lingham CA 3 of 2019 where it was held that an administrative confusion should not preclude a party from having access to the superior court and for the Court to put more weight on the merits of the application rather than the delay.
23. A claim with evidences of fraud, is an exception to a cause of action for eviction: Wati -v- Sharma [2022] FJHC 672; HBC 285 of 2017.
24. The Applicant/Plaintiff submits that the Defendants reside on the property and still has a share of the property, thus no prejudice arises if Leave is granted.
25. The First Respondent/Defendant submitted that there was unreasonable delay i.e .7 months (239 days) for the Applicant/Plaintiff to file their application. Furthermore, the Master had correctly struck out the Claim as the Deed of arrangement was entered into on July 2004 and hence the proceedings commenced outside of the Limitation Act.

26. The Second and Third Respondent/Defendant submits that the reason for the delay is not genuine or reasonable and reference was made to Mishra Prakash and Associates -v- Nagan Engineering (Fiji) Limited [2018] FJHC 198 where the reason for delay lacked candour and was unsatisfactory. The length of delay is 265 days which is substantial and not inordinate.
27. Second and Third Respondents/Defendants submitted cases of Wallingford -v- Mutual Society [1880] AC 685 which was cited in Kawa -v- Morris [2016] FJHC 976 where it was held that vague allegations of fraud with no material facts to determine what was the alleged fraud is insufficient words for a cause of action in Fraud written into the Claim. The particulars of concealment and when the Fraud was made known must be pleaded as well: Vula -v- Merchant Bank of Fiji Ltd [2014] FJHC 54.
28. The Second and Third Respondents/Defendants therefore argue that there was no prospect of success in the Plaintiff/Applicants grounds of appeal and therefore their application for extension of time and Leave to appeal should be dismissed.

LAW AND ANALYSIS

29. The current application before me seeks the Court to grant Leave to Appeal and Leave to Extend time to Appeal. The basis of the application stems from the decision of the Master which struck out the Writ of Summons and Statement of Claim.
30. Where Master has struck out the Writ of Summons, this brings the matter to a complete close, and hence an Appeal is made, of right, directly to the High Court.
31. Order 59 Rule (8) prescribes the process 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.
32. Therefore on this basis, the Appellant/Plaintiff need not seek Leave to Appeal from Masters Orders as the learned Masters decision concluded the matter altogether.

33. Given that the application for Appeal is made after the 21 day requirement, it is the correct for the Appellant/Plaintiff to make an application for extension of time. Sub-Rule (10) provides:

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 and before the expiration of that period and to a single judge after the expiration of that period.

34. The Appellant/Plaintiff is seeking Leave for Extension of Time on the basis that their application is beyond the period required i.e 267 days in total which falls within the discretion of this Court.

35. To determine whether or not to grant Leave to Extend time the court consider the principles provided for in Native Land Trust Board -v- Khan [2013] FJSC 1; CBV 0002.13 where the Supreme Court held that the following issues to be considered:

- (i) Reason for failure to file on time;
- (ii) Length of delay;
- (iii) Prospects of success in grounds of appeal;
- (iv) Prejudice for the Defendant/Respondents.

Reasons and length of delay

36. The reasons for the delay in filing the Notice of Appeal on time is because the Appellant/Plaintiff was seeking further instructions from their client.

37. When they did file, it was to seek a stay of the Masters decision pending Appeal. This application was later withdrawn. From the Appellant/s calculation this amounted to 73 days.

38. Eventually, the Appellants applied for Leave to Appeal and Leave Extend Time to Appeal.

39. By this time the delay in filing amounted to 267 days which equates to approximately 8 months and 27 days. It is clear that the factors highlighted are causing delays e.g. execution of documents from overseas and sending it over can long be overcome by the quick action of the Appellant/Plaintiff counsel. His delay in securing instructions and then delay in filing documents had added up to what it is now 267 days is substantial.

40. In United Coach Builders Ltd -v- Satya Lingham App -3 of 2019 the administrative confusion could be partly blamed on the registry who was unable to confirm on the first day of filing in which registry the summons to appeal was to be filed as there was no case number allocated. For this my brother Judge Mansoor rightly held that an administrative mistake from the registry should not bar and application on Appeal that has merits.
41. This case is distinguished. The error is not of the registry. The Appellant and their Counsels were unable to file their application on time. It was not an error or mistake but a blatant disregard for the Rules.
42. The reasons for the delay are unable to satisfy this Court that the delay is justified.

Any prospects of success

43. The Court considers whether there are prospects of success and whether there is merits to the Grounds of Appeal. The Appellant/Plaintiffs argue that they had raised general issues pertaining to fraud in the Statement of Claim which was an exception to the requirements under the Limitation Act. The Claim states that:


“That the 1st and 2nd Plaintiffs deny executing the Deed of Family Arrangement before a witnessing officer and claim that neither Elizabeth Maya Stuart nor Epeli Vula explained or witnessed their signature in their presence.”

44. The Court is also mindful that the Master has powers under Order 18 Rule 18 to strike out the application or to allow for further amendments to the Claim.
45. I am mindful that the Master also arrived at her decision on the basis that the Claim was unable to establish the cause of action of Fraud.
46. The preparation of a Statement of Claim for a Writ of Summons to be filed is most important to any Claimant. The Claim states all the facts relied upon including particulars of the cause of action.
47. The Claim for Fraud as a cause of action requires particularization of the alleged misconduct. Therefore a draft that fails to particularize the claim

and stipulates only that the alleged Plaintiffs did sign but that it was not witnessed before a witnessing officer lacks the cause of action it intends to seek.

48. The poor drafting as well as the laxity in the manner in which the claim is drafted is a lacuna for which Counsels can take advantage of Courts wide discretion for their benefit in order to get a second bite to the cherry when the Claim was initially not properly drafted from the beginning. This is clearly an avenue for abuse of process.
49. I therefore found that it was within the discretion of the Master for the best administration of justice to exercise her discretion either way.
50. I therefore find that the grounds of appeal lacks prospect of success in this matter.
51. Finally, to grant Leave will prejudice the Defendants/Respondent as they have been granted the fruits of their judgment for their benefit for 8 months from the day of the decision. They are already residing in the premises as per their share as well as the Appellant/Plaintiff who has his/her share to also benefit from.
52. I find that there will be injustice and prejudice if Leave for Extension of time to Appeal is granted.
53. **The Court Orders as follows:**
 - (i) **Application for Leave to Extend time to Appeal the decision of Master be dismissed;**
 - (ii) **Court will not grant Leave to Appeal;**
 - (iii) **Costs awarded to the Defendants at \$500 each.**




Ms Senileba LTT Waqainabete - Levaci
Puisne Judge