

IN THE FIRST CLASS MAGISTRATES COURT
AT SUVA
CIVIL JURISDICTION

MBC 54 of 2016

BETWEEN: KALARA VUSONIWAILALA

APPLICANT

AND: PACK LEADER PACIFIC LIMITED

RESPONDENT

Date of Hearing : 13 March, 2019

Date of Ruling : 13 March, 2019

Counsels : Mr Rokodreu for the Applicant

Defendant in Person

RULING

(Application for Enlargement of Time)

The Application

1. Before the Court is the Appellant's Application for the following:
 - a) Leave to appeal out of time the Order of the Small Claims Tribunal Referee delivered on 10 September 2018;
 - b) For time to be extended of file Notice and Grounds of Appeal; and
 - c) And stay of execution pending appeal.¹

¹ Section 33 (5) of the SCT Act, specifically states that execution of the orders of the Small Claims Tribunal shall be stayed upon the filing of the Notice of Appeal.

Affidavit Evidence

2. The following affidavits were filed in this matter:

- a) Affidavit of Kalara Vusoniwailala (in support) - sworn on 12 October 2018 and filed on 2 November 2018 (Kalara's Affidavit); and
- b) Affidavit of WekaNaivaluvou (in Answer) - sworn on 17 December 2018 and filed on 18 December 2018 (Weka's Affidavit).

Legal Principles relating to enlargement of time to appeal

3. The law relating to enlargement is well established in Fiji. The following factors although not an exhaustive are to be taken into account when dealing with such application:

- a) Length of delay;
- b) Reason for the delay;
- c) Chance of appeal succeeding if time for appeal is extended; and
- d) Degree of Prejudice to the Respondent if application is granted.²

4. In the case of *Prasad v Prasad* [2016] FJCA 116, the Court cited with approval the principles established in the case of *Avery v No. 2 Public Service Appeals Board and others* [1973] 2 NZLR 86 as per Richmond J at page 91, the general principle that:

When once the Appellant allows time for appealing to go by, then his position suffers a radical change, whereas previously he was in a position to appeal as of right, he now becomes an applicant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he appeals.

² *Begg -v- Heera* (2013) FJHC 436; HBA 02.2012

5. The need for and the importance of complying with the Rules was emphasised in the case of *Kenneth John Hart v Air Pacific Ltd*, Civil Appeal No. 23 of 1983. Similarly, in the case of *Native Land Trust Board v Kaur* [1997] FJCA 44, the Court adopted the principles espoused in the case of *Venkatamma v Ferrier - Watson*, Civil Appeal No. CBV0002 of 1992 at p.3 that:

We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal; in cases not having the special combination of the features present here, it is unlikely to be excused.

6. The discretionary powers of the Court to extend or enlarge time must be exercised judicially. The burden is on the Applicant to satisfy the Applicant that it is just and equitable that an opportunity be given to upset the orders of the SCT Tribunal.³ I shall now deal with each of the above factors.

Length of the Delay

7. The Referee's orders were made on **10 September 2018**. The Appellant's Notice of Motion that is now before the Court was **received on 12 October 2018** and **filed on 2 November 2018**. Calculating the time the Motion and Affidavit was received by the registry that would put the delay at 33 days.
8. In most recent decisions delay has been taken to be an impediment to the just resolution of the case. In *Securum Finance Ltd v Ashton* [2001] Ch 291 (*Securum Finance Ltd*) is extremely important since it elaborates on the changes, following the introduction of the new rules, the courts in England and Wales have been more

³ *Ali v Ilaitia Boila and Chirk Yam Fiji Development Bank of Fiji Civil Appeal No. ABU 0030 of 2002*

ready to **strike out actions on the ground of delay alone**. At [30] and [31] Chadwick LJ wrote that:

[30] the power to strike out a statement of claim is contained in CPR r 3.4. In particular, rule 3.4 (2) (b) empowers the court to strike out a statement of case ... if it appears to the court that the statement of case is an abuse of the court's process ... In exercising that power the court must seek to give effect to the overriding objective set out in CPR 1.1: see rule 1.2 (a). The overriding objective of the procedural code embodied in the new rules is to enable the court "to deal with cases justly": see rule 1.1 (1). Dealing with a case justly includes "allotting to it an appropriate share of the court's resources, while taking into accounts the need to allot resources to other cases".

9. In the *Arbuthnot Latham Bank Limited -v- Trafalgar Holdings Ltd* (1998) 2 AllER 181 @ 191, case this court pointed out in a passage which I have already set out that:

In *Birkett v James* the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance.

10. Although there is no equivalent rules to the *rule 1.1 (1) of Civil Procedure Rules 1994, (UK)* in the *Magistrates' Court Rule, 1945* or the *High Court Rules, 1998*. The principle in the above cases applies in this matter. Delay is an important consideration. Delay has to be viewed in relation to other cases waiting in the queue to be heard by the Court.

Reason for the delay

11. The Appellant's Affidavit offers no explanation for the delay. She simply states in paragraphs 4 and 5 that she did not receive the ruling until 1st October 2018.

12. The Court noted that this was the date when she was served with the ruling of the SCT. The Ruling was served by the Respondent.
13. The Appellant has not attempted to explain why she did not appear on **10 September, 2018** when the Ruling was delivered in the Tribunal. She did not attempt to explain or show any proof that **she followed up** with the Tribunal to **find out the status of the case**.
14. In *Chaoxui Cui v Chand (2017) FJMC 62, MSC. 16.2016 (28 April, 2017)* the Court stated

10. I will now deal with the length of delay. The Appellant state that he is 8 days out of time. I disagree. The 14 days appeal period ended on the 5th of October, 2016. The current application was filed on the 14th of October, 2016. The Appellant is out of time by 9 days.

The Appellant state that the reason for the delay was that the prescribed form 6 was not attached to the Notice of Appeal that he had attempted to file on the 3rd of October, 2016. In any event, I note that, at that point in time, the Appellant was still within the stipulated timeframe, and yet, the Appellant still fail to remedy the error within the next 24 hours. Similarly, there is no explanation as to why he did not act within that 24 hour window. Furthermore, there is also no explanation as to why it took another 9 days to lodge an application to appeal out of time. In short, the Appellant has failed to act with due diligence and has not provided any valid reasons for his delay.

15. In the case of *Fa v Tradewinds Marine Ltd and another (unreported), Civil Appeal No. ABU 0040 (1994)*, the Court held that **a delay of only 4 days required satisfactory explanation** before an extension of time could be properly given. In that case, the applicant gave no explanation at all and consequently he was

refused leave to appeal out of time. The Court finds that there is no reasonable explanation for the delay.

Merits of the Appeal

16. In *Sheet Metal & Plumbing (Fiji) Ltd v Deo* [1999] FJHC 26; HBA0007d.99s (14 April 1999) is relevant in these proceedings. The Court held:

Even more trenchant is the view expressed by Greig J. in *Hertz New Zealand Ltd. V. Disputes Tribunal* (1994) 8 PRNZ where his honour said in rejecting the appeal in that case, at p.151:

"... *There is no appeal on the merits even if there is a clear and fundamental error of law in the conclusion of the Tribunal*".

Quite, plainly in my view not only is this second 'ground of appeal' misconceived in so far as it seeks to question the 'merits' of the referee's decision without pointing to any 'procedural unfairness' but further, in so far as it purports to be predicated on the difficult legal principle of unjust enrichment' it fails to properly appreciate the function and nature of a non-legally qualified referee exercising what in effect is an equity and good conscience jurisdiction.

17. Similarly, in *Aaryan Enterprise vs. Mehak Unique Fashion* (2011) FJHC 727, Civil Appeal No. 17 of 2011:

It is a right of appeal which requires the Appellant Court (the Magistrates Court) to review the proceedings conducted by the Referee in the Small Claims Tribunal and determine whether the Appellant's complaint has any merit. There is certainly, no right of Appeal in respect of any error of law or in respect of factual error. The proceedings to be adopted in clearly one of review and not one of re-hearing.

18. The matters deposed in Appellant's Affidavit does not address the two grounds of appeal enunciated in *Section*

33(1) of the Small Claims Act and or the above authorities and therefore has no merits. Furthermore, there is no proposed Notice of Appeal and Grounds of Appeal being attached to the Affidavit in Support.

Prejudice

19. The Court concurs with the sentiments expressed by Justice Kumar in *Begg v Heeraman (Supra)*:

Public Policy demands that a litigant should not be deprived of fruits of his / her judgment.

20. From this vantage point, the Respondent suffers prejudice by the faults of the Appellant. Therefore, to further substantiate the delay of depriving the Respondent of the fruits of its judgment based on an Appeal (if there is any) that has no prospect whatsoever of succeeding is prejudicial and tantamount to an abuse of the process of the Court.

Final Orders

21. It is hereby ordered that the Appellant's application is dismissed with costs of summarily assessed at \$ 200.00 to be paid within 21 days.



Ropate Green

Senior Resident Magistrate