

IN THE SUPREME COURT OF FIJI

Civil Petition No. CBV0010/2017

[From the Court of Appeal in Civil
Appeal No. ABU0036 of 2015.]

BETWEEN: MICHAEL CHANDRA MANI

1st Petitioner

AND: SHIRLEY ROSINA MANI

2nd Petitioner

AND: DONALD MANI

Respondent

Coram: Gates J

**Counsel: Ms Fazilat Shah and Mr. Z.S. Mohammed
 for the Applicant Petitioners
 Mr. M.A. Khan for the Respondent**

Date of Hearing: 8th January 2018

Date of Ruling: 24th April 2019

R U L I N G

- [1] The origin of this dispute between two brothers was a piece of land. The Petitioners were in financial difficulties. They could not keep up with mortgage repayments on a Housing Authority sub-lease. The 1st Petitioner's brother, the Respondent agreed to buy them out. Some of the facts were in dispute.
- [2] The Court of Appeal handed down its decision on 26th May 2017, finding in favour of the Respondent. The Petitioners had not been represented in the High Court, but were represented by experienced counsel in the Court of Appeal.
- [3] On 21st September 2017 new solicitors for the Petitioners filed a Notice of Motion seeking enlargement of time for filing of the petition. They also sought a stay of proceedings.

- [4] Allowing for the 42 appeal period from 26th May 2017, the filing of the Notice of Motion is 76 days late, a period of approximately 2½ months.
- [5] Jurisdiction has been found for the Supreme Court to enlarge time in certain circumstances. The approach involves a consideration of five factors by way of guidance as to whether indulgence should be granted. Those factors 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?

Reason for failure to file within time

- [6] The First Petitioner filed an affidavit in support of the motion. In it he deposed chiefly as to what had happened in the High Court. He did not explain why the petition to this court was late. He said:

“8. That the Respondent/Plaintiff did not seal the Orders of the Court of Appeal and the Legal Aid Commission did not disclose to us the Orders of the Court of Appeal.

9. That we engaged our present Solicitors to investigate the status of the Court of Appeal proceedings and they revealed to us that our appeal was dismissed.”

- [7] This is an unsatisfactory explanation. In effect he is stating that he did not know that they had lost the appeal, and secondly that his experienced counsel did not state that fact or explain the result to him. According to the affidavit of the Respondent both Petitioners were in court for the handing down of the decision and were accompanied by their two daughters. They would surely have known that they had lost the case and would have to consider whether to proceed for further appeal.

[8] The orders of the Court of Appeal were straightforward and simple:

- “1. The appeal of the appellants is dismissed.
2. Parties to bear their own costs of the appeal.”

This result would not have been difficult to explain to the Petitioners.

[9] In the judge’s decision, his lordship considered the issue as to whether the Petitioners were, as claimed, unsophisticated in the matter of bank documents and procedures.

At paras 17-19 of his judgment his lordship said:

“17. The Defendants in their Statement of Defence states that they are not legal savvy and therefore the Plaintiff got the Defendants to put their signatures on documents that the Defendants at many times were not aware. In the Defendants written Submissions filed it is stated that second defendant received secondary and tertiary education in Natabua High School and acquired the skills of clerk/typist. It is stated further therein that upon completion of her education in the year 1981 she attained employment at the National Bank of Fiji, Suva Branch and in the year 1997 the Bank faced a crisis and she was made redundant but attained a package of \$16,000.00 for her service of 15 years to the bank.

18. It is difficult for me to believe that the second defendant with such long work experience in a Bank signing documents which she was not aware. She being a former employee of a Bank should have been aware of the banking transactions and the documents required in such instances.

19. The Plaintiff further stated in evidence that apart from seeking vacant possession of the property he also seeks a sum of \$48,000.00 as rental income from the date the property was transferred into his name. This evidence was never challenged by the Defendants in cross examination.”

[10] This was a highly contested matter of great concern to the Petitioners. It is clear from the High Court judgment that the respondent was closely questioned by the Petitioners and that their side of the story was put to him fully during the evidence. There is sufficient evidence here that would indicate the Petitioners knew what the outcome of

the Court of Appeal's decision was. They failed to move to file their petition within time, and that delay has not been explained satisfactorily.

Length of the Delay

[11] In **NLTB v Ahmed Khan and Anr.** CBV0002.2013 the delay was 96 days. The court declined to enlarge time. In **Alislya Sharma & Anor v Singh** ABU0027.03S the Court considered 40 days "a significant period of delay" and refused to extend time. Leave was also refused in **Avery v No. 2 Public Service Appeal Board & Others** [1975] 2 NZLR 86 [11 days] and in **Latchmi v Moti** [1964] 10 Fiji LR 138 [47 days]. In **Gatti v Shoosmith** [1939] 3 All ER 916 there had been a few days only and notice had been given to the respondent's solicitors. I conclude the delay is significant here.

[12] But a civil case is not the same as a criminal case when considering the exercise of a discretion. Following Marsack J's observations in **Latchmi v Moti** [1964] 10 Fiji LR 138 at 145G I had said in **McCaig v Abhimanu** CBV0002.12: 27th August 2012:

"[9] But it must be remembered that whilst in a compelling case, the court may more easily be convinced of a need for intervention in a criminal case with less regard for the prejudice caused to the State as respondent, the position is different in a civil case. In such cases when exercising civil jurisdiction, the appellate courts have tended to be less lenient, than when considering the position of an Accused person who lodges a late appeal. In civil appeals the court has to be more even-handed and consider equally the rights and interests of the Respondent with those of the applicant."

Whether there is a ground of merit justifying the appellate court's consideration?

[13] In the Court of Appeal the Petitioners' counsel argued and relied on 2 grounds only. They were:

"1. That the learned trial judge erred in law and in fact in holding that the 1st agreement was withdrawn and the letter dated 15th of March 2007 constituted the 2nd sale and purchase agreement when the letter was only written to the Manager of Bank of Baroda to facilitate the loan application by the respondent.

3. That the learned trial judge erred in law and in fact in holding that the respondent had paid \$40,000 in mortgage repayment when there was no documentary evidence submitted by the respondent to prove the payment of \$40,000.”

[14] In the petition to this court five grounds have been drafted:

- “3. That the principal grounds upon which this petition is based are:
- (a) That the Learned Judges of the Court of Appeal erred in law in not upholding the Appellants appeal.
 - (b) That the Learned Judges of the Court of Appeal erred in law in failing to recognise that there was a procedural irregularity in the trial process, namely that the Appellant were not given an opportunity to elect whether to give evidence or remain silent.
 - (c) That the Learned Judges of the Court of appeal erred in law in not setting aside the Orders of the High Court in the face of clear evidence of procedural irregularity particularly so when the appellants did not have the benefit of Legal representation.
 - (d) That the Learned Judges of the Court of Appeal erred in law in not appreciating that the Appellants defence and counter claim was struck out without the Learned Judge proffering any cogent reason for so doing.
 - (e) That the Learned Judges of the Court of Appeal erred in law in not recognising that the Trial Judges assessment of the credibility of the Appellants could not be commented upon as they were not given an opportunity to give sworn evidence and thus resulting in the overall verdict being tainted.”

[15] Ground (a) is not a ground. It has no particulars and it points to no specific error.

[16] **Ground (d)**

In striking out and dismissing the defence and counterclaim the judge did give reasons for his finding. No evidence was adduced in support of the counterclaim. The judge explained in his judgment why he found for the Plaintiff and not for the Petitioners. Ground (d) is not an arguable ground.

[17] Grounds (b), (c) and (e) deal with the same complaint, an allegation that the judge in the High Court trial had not given the Petitioners the right to give evidence in their

own defence. However they were represented by experienced counsel in the Court of Appeal. If this was the major plank of grievance it could have been raised with their counsel and urged at that time. The failure to call a witness may have been linked with their counterclaim.

[18] As the trial judge found, the Petitioners were not lacking in “legal savvy.” They appear to have been active in the trial and cross examined the plaintiff closely on the live trial issues. No naivety appeared to have been shown.

[19] The trial judge noted:

“The defendants explained whether they are calling witnesses. Say no.”

“Explained” suggests their rights were communicated to them. The Respondent also deposes that they “were given an opportunity to give evidence.” With their backgrounds it is unlikely the petitioners would have felt they were not entitled to give evidence in rebuttal of the plaintiff’s own sworn evidence. This ground has no substance.

Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

[20] All of the grounds lack merit or substance. It cannot be said, in a case with a delay well outside the appeal period, there is a ground that will probably succeed.

[21] Further there are the leave considerations for a civil appeal to consider.

Section 7(3):

“(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case raises –

- (a) a far-reaching question of law;
- (b) a matter of great general or public importance;

- (c) a matter that is otherwise of substantial general interest to the administration of civil justice.”

[22] The grounds fail to meet the threshold for the grant of leave to appeal to the Supreme Court.

[23] Whatever the unfortunate circumstances of the financial difficulties facing the Petitioners, the late application for leave seems to bear the marks of a denial for the successful litigant of the fruits of his unremarkable litigation.

[24] If enlargement cannot not be allowed as a discretionary remedy, there can be no question of a stay either.

[25] In the result:

1. The application for enlargement of time within which to lodge the petition is declined.
2. The stay is refused.
3. No order for costs.



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The Hon. Mr. Justice Anthony Gates
Judge of the Supreme Court

Solicitors:

Fazilat Shah Lawyers for the Petitioners
M.A. Khan for the Respondent