IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0115 of 2016
(High Court Civil Appeal No. HBM 29 of 2015)

BETWEEN	:	**SIMON SERU**
		Appellant
AND	:	**CREDIT CORPORATION LIMITED**
		Respondent

Coram	:	**Basnayake JA** **Lecamwasam JA** **Guneratne JA**
Counsel	:	**Mr. V. Faktaufonfor the Appellant** **Mr. R. K. Naidu for the Respondent**
Date of Hearing	:	**15 May 2018**
Date of Judgment	:	**01 June 2018**

JUDGMENT

Basnayake JA

[1] I agree with the reasoning, conclusion and proposed orders of Lecamwasam JA.

Lecamwasam JA

[2] This is an appeal filed by the Appellant against the judgment of the High Court at Suva, dated 29th August 2016 on the following grounds of appeal:-

1. The learned Judge erred in law and in fact in failing to consider that the Appellant was resident in Australia, having migrated there after the political unrest and events of 2006; additionally, creating restraints during the hearing of the matter within the Magistrate's Court with respect to Order 37, Rule 1 and Rule 4 of the Magistrate's Court Act, Cap 14.

2. The learned Judge erred in law and in fact in failing to consider the fact that the delay in filing the appeal within 7 days after the judgment was passed was because the magistrate's decision dated 9th December 2014, was sent to the Appellant in Queensland, Australia 10 days after the judgment was passed. Furthermore, due to delay, the Appellant's Solicitors filed the appeal papers on 24th December 2014 during the period of judicial vacation of the courts of Fiji; and were further informed by the High Court Registry staff to file the documents in the Magistrate's Court registry, wherein the documents remained until January 2015.
Moreover, the learned Judge may have incorrectly misdirected itself, in fact by presuming that the malconduct and neglect on the part of Registry staff, was the fault of the Appellant when the root causes of delay were in fact in the timing and delivery of the judgment.

3. That the learned Judge erred in law and in fact by failing to take into account or properly consider the merit of the Appellant's case and thereby focussed mainly on the delay factors which comprise only one of the factors to be taken into account in terms of an application for enlargement of time pursuant to Order 3 Rule 9 of the High Court Rules 1988.

4. That the learned Judge erred in law and in fact by awarding costs of F$1000.00 to the Respondent.

5. The appellant reserved the right to amend the grounds of appeal filed herein upon receipt of the certified court records.

[3] The facts leading to this Appeal in brief are:-

The Appellant had entered into an agreement with the Respondent for the purpose of financing a vehicle. The Respondent had sued the Appellant in the Magistrate's court at Suva, for $30,820.06 said to be due and owing in respect of the above financial arrangement.

[4] A ruling was made in the above case on 9th December 2014 by the learned Magistrate wherein a period of 7 days was given to the Appellant to appeal the ruling. The Appellant maintains the position that although 7 days were given for the filing of an appeal, the ruling was issued from the Registry 10 days after its sealing thereby depriving the appellant of the opportunity to file the appeal within the required 7 days. He contends that the responsibility for his failure to file the appeal within 7 days lies with the Registry, and hence should not be construed to his detriment.

[5] On 24th February 2015, the appellant made an application to the High Court to enlarge time to appeal the decision of the Magistrate dated 9th December 2014, which was dismissed by the learned High Court Judge. The instant appeal is from the above dismissal of the Learned High Court Judge.

[6] In relation to the 1st ground of appeal, the appellant laments that he was unable to file the appeal within time as he is resident away in Brisbane, Australia, coupled with the fact of his failing financial situation, and the events in Fiji in 2006. The Appellant has failed to demonstrate the impact of the events in 2006 in the original action which was filed in

2012, let alone on the delay in filing the appeal, which was made subsequently. I consider it too far-fetched and lame an excuse and believe that sufficient time had elapsed since the events in 2006 for the appellant to have had time to recover.

[7] His residence away from Fiji also cannot be considered as an acceptable reason for the delay. Unlike in olden days, technology has made so many strides forward that anyone in any part of the world could give instructions instantaneously to his counsel to take necessary steps. Hence his absence from Fiji cannot be considered a tenable ground for delay.

[8] In relation to the context of the 1st ground of appeal it is pertinent to set out Order 37 Rule 1 of the Magistrate Court Act which is as follows:-

> *"**Order 37 – Civil Appeals***
>
> ***A- Notice of Intention to Appeal***
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> *"1. Every appellant shall within 7 days after the day on which the decision appealed against was given, give to the respondent and to the court by which such a decision was given (hereinafter in this Order called "the court below") notice in writing of his or her intention to appeal, provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced."*

[9] As is obvious from the wording of the rule, the requirement is mandatory in nature. It is imperative that the notice of intention to appeal be given within 7 days, albeit a verbal notice suffices provided it is given immediately after the judgment is pronounced. Therefore, the emphasis is not so much on the form of the notice, but on the time limit of 7 days. In certain instances, counsel resort to make applications moving for the indulgence of court in the exercise of discretion. When the rules are mandatory, court is debarred from using such discretion.

[10] There is no unfettered discretion like that of a 'wild ass'. The courts are not free to omit or add to the language contained in a statute; nor should a Court lightly presume a mistake or omission on the part of the draftsman. Therefore, the appellant must satisfy the court in relation to the burden of proof before the court could venture to exercise it's discretion. In the absence of such proof, the Magistrate is bound to act according to the powers conferred on him by the statute.

[11] Adverting to the 2nd ground of appeal, the Appellant had not produced any proof of the belated receipt of the ruling, without which, the court could not have come to his rescue. In the absence of such proof, the ground cannot be sustained.

[12] On the 3rd ground of appeal, it is obvious that the application for adjournment one day before the trial and an application for video recording at the eleventh hour, as had been made out by the Appellant could not have been allowed and the learned Magistrate had quite rightly refused the application. As pointed out by the Respondent in his written submissions, the observations made by Palmer, J in **Sayed Ahmed Hussein v Resort Management Limited**, 36 FLR 8, at p.10 are pertinent and read as follows:-

> *"There appears to be an impression abroad – at least among some practitioners – that the Court's sole function when an adjournment is sought is to rubber stamp that request with approval. It seems to be thought that Counsel only need to apply for an adjournment on however flimsy grounds and however late in the piece and the Court is then obliged to organise its own business accordingly..."*

[13] The learned High Court Judge has, in his judgment, adverted to all aspects of the case in a meticulous manner and had referred to the judgment of Thompson, J in **TevitaFa v Tradewinds Marine Ltd and Oceanic Developers (Fiji) Ltd**, (ABU 0040.1994) which

is relevant to the present proceedings. Thompson J, referring to a delay of 4 days, opined thus;

> *"That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only four days requires satisfactory explanation before an extension of time can properly be granted."*

[14] In the instant case, the delay as admitted by the Appellant himself in his written submissions, in paragraph 2.3, is seventy one days. As I have already stated, absence away in Australia or events which occurred in 2006, cannot be taken into consideration by this court for reasons stated in the preceding paragraphs.

[15] The excuse given by the Appellant as to the legal vacation of courts cannot hold good as the Magistrate's court registry is open during office hours even during the legal vacation. Therefore had the appellant or his solicitors been attentive and vigilant this situation could have been averted.

[16] It is the indolent and lackadaisical approach of the Appellant and/or his Solicitors that contributed to the instant problem. Therefore this court cannot come to the rescue of the appellant considering the long delay of 71 days which is not satisfactorily explained.

[17] I find that the learned High Court Judge, as I have already observed, has dealt carefully with the relevant factual as well as the legal aspects before coming to the conclusion. In his judgment, he has quite correctly adverted to a judgment by Gates, J (as he then was) wherein who had agreed with the opinion expressed in considering the criteria for the enlargement of time applications as laid down in the judgment of **AG & Another v Paul Praveen Sharma** (Civil App. No. ABU 0041/93S), viz:-

i) The reason for the failure to comply

ii) The length of the delay

iii) Is there a question which justifies serious consideration

iv) If there has been substantial delay, have any of the grounds such merit that they will probably succeed.

v) The degree of prejudice to the Respondent in enlarging time.

[18] The learned High Court Judge had considered the above factors elaborately in relation to the matter at hand starting from paragraph 11 of his judgment to almost the end of his judgment. I find this elucidation and conclusion sufficiently compelling as to avoid engaging in a redundant personal exercise of revisiting the same matter in identical detail here.

[19] Since the instant case is an appeal from an Order of the High Court Judge exercising appellate jurisdiction, the Appellant has to clear the hurdle placed by Section 3(4) of the Court of Appeal Act (Cap.12) reads thus:-

> "3(4) *Subject to Section [7(2) of the Administration of Justice Decree 2009], appeals lie to the court on a question of law only from final judgments of the High Court given in the exercise of the Appellate Jurisdiction of the High Court."*

[20] Having perused the evidence and issues in this case, I have not seen any question of law. In this connection, see the case of **Bijma Wati v Gaya Prasad**; Civil Appeal No. ABU 0033 of 2016 (14 September 2017) where the Court of Appeal had dealt with the issue of question of law in detail citing various authoritative judicial precedents

[21] Hence I do not see any reason to interfere with the judgment of the learned High Court Judge and I affirm the judgment, dismiss the appeal with costs of $4,000.00 payable by the Appellant to the Respondent.

[22] For the reasons stated above, I am satisfied that this appeal cannot be allowed to stand and hence I would dismiss the appeal.

Guneratne JA

[23] I agree with the reasoning, conclusion and the proposed orders of Lecamwasam JA.

The Orders of the Court are:

1. *Appeal dismissed.*
2. *Appellant to pay $4,000.00 as costs to the Respondent.*

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL