IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 80 of 2024
[In the High Court Family Division Appeal No 0009 of 2017]

BETWEEN	**:**	**JOHN VAIVAO FATIAKI**
		Appellant
AND	**:**	**MOBIL OIL AUSTRALIA PTY LIMITED**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. A.V. Bale for Appellant** **Mr. S. Fatiaki for Respondent**
Date of Hearing	**:**	**06 March 2025**
Date of Ruling	**:**	**26 March 2025**

RULING

[1] The appellant has filed a summons together with his affidavit in support seeking enlargement of time to appeal against the ruling of the High Court dated 30 July 2024[1]. By this ruling, the High Court had dismissed the appellant's summons subject to cost of $2000.00. By his summons in the High Court supported by his affidavit, the appellant pursuant to section 169 of the Land Transfer Act sought an order that the respondent must show cause as to why an order for immediate vacant possession of the property situated at Vuda on Lot 1 on Plan SO 1345 on Native Lease No. 9354 (part of) and comprised in Crown Lease No. 248965 should not be made. The respondent had opposed the summons.

[1] **Fatiaki v Mobil Oil Australia Pty Ltd** [2024] FJHC 466; HBC342.2023 (30 July 2024)

Should the appellant's application for extension of time to appeal in terms of Rule 17(3) of CA Rules be allowed?

Law on enlargement of time

[2] It is settled that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time[2]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (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? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[3] Nevertheless, these matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the circumstances it would be just to grant the application[4]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[5]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[6].

[3] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure

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[2] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

[3] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

[4] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

[5] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

[6] Per Marsack, J.A. in **Latchmi v Moti** (supra)

to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[7]

[4] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[8] In this case the application for leave to appeal out of time is late by about 08 days. This length of the delay is not substantial. 40 days have been considered 'a significant period of delay'[9]. Delay of 11 days[10] and 47 days[11] also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation[12]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[13]

[5] Rules of court must, *prima facie*, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.[14]

[6] As for the reason for the delay the appellant claims in his affidavit that there was an error of calculating the appealable period. It is not clear as to who made the miscalculation. The respondent in his affidavit had not substantially challenged this reason. Therefore, I am

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[7] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)
[8] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)
[9] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)
[10] **Avery v Public Service Appeal Board** (supra)
[11] **Latchmi v Moti** (supra)
[12] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported
[13] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)
[14] **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

inclined to accept the explanation for the delay as genuine. However, I note that there is no credible material before me to show that the appellant's solicitors had attempted to file the notice of appeal on 10 September 2024 just a day outside the 06 weeks given by Rule 16(b) of the Court of Appeal Rules.

[7] Even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if extension is to be granted, then the application must be rejected; even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless the reason for the delay in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers[15]. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said[16] that the effect of propositions (i) and (ii) subject to proposition (iii) is to make the merits of the appeal the paramount, indeed the decisive, consideration and that goes too far because there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused. The Supreme Court added that the bottom line is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not

[15] Per Dr. Almeida Guneratne, J.A. in **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014) & **Gregory Clark v Zip Fiji** [2014] FJCA 189; ABU0003.2014 (5 December 2014)

[16] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected. As for the proposition (iii), the Supreme Court said mistakes made by lawyers is not an exceptional category for this purpose and the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive.

[8] However, Dr. Almeida Guneratne, P took a different view later and said[17] that if the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case***) are explained to the satisfaction of Court, then the matter should be left to the full Court to determine the appeal on the merits because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court's discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied. If the threshold criteria as envisaged in (a) and (b) above are not met by an applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** in as much as the above reasons would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[9] Because Dr. Almeida Guneratne, P has not taken into account the views of the full court judgment of the Supreme Court in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** in his second ruling in ***Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary*** and also because I am bound by the Supreme Court decision, I am inclined to follow the Supreme Court decision in accordance with section 98(6) of the Constitution of Fiji incorporating the doctrine of *stare decisis*.

[17] **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

[10] Therefore, I am still required to consider the prospect of the appellant's appeal before the Full Court, for interest of justice demands that I take a holistic approach[18] by considering all the factors set out in ***Native Land Trust Board v Khan*** (supra) in addition to any other relevant factors before exercising my discretion either to grant enlargement of time or not.

The test for leave to appeal and extension of time

[11] In ***Native Land Trust Board v Khan*** (supra) Chief Justice Gates (as he then was) sat as a single judge of the Supreme Court and considered an application for enlargement of time in a civil matter to lodge a petition for special leave appeal to the Supreme Court which is governed by section 7(3) of the Supreme Court Act. Chief Justice Gates applied the same criteria for special leave in criminal matters under section 7(2) of the Court of Appeal Act as well[19]. These provisions lay down the thresholds to be reached before special leave to the Supreme Court is granted. However, there are no similar guidance in the Court of Appeal Act governing leave to appeal or extension of time matters under section 20(1)(a) and (b). It is the fourth limb of the test "*is there a ground of appeal that will probably succeed?"* in the criteria set out in ***Native Land Trust Board v Khan*** (supra) that some have equated to mean *"whether there is a real prospect of success"* and applied that test under section 20(1)(a) and (b) of the Court of Appeal Act. However, the latter is directly taken from the relevant test under CPR r.52.6(1) for an application for permission to appeal in UK *i.e.* permission to appeal may be given only where –

> *a. the court considers the appeal would have a real prospect of success; or*
> *b. there is some other compelling reason why the appeal should be heard.*[20]

[12] It is in this context that Lord Justice Peter Jackson in England and Wales Court of Appeal (Civil Division) in **R (A Child)** [2019] EWCA Civ 895 said that:

> *'The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of the relevant sub-rule is*

[18] **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)
[19] **Kumar v State; Sinu v State** [2012] FJSC 17; CAV0001.2009 (21 August 2012)
[20] **R (A Child)** [2019] EWCA Civ 895

that the appeal would have a real prospect of success. As stated in Tanfern v Cameron-MacDonald (Practice Note) [2001] 1 WLR 1311 CA at [21], which itself follows Swain v Hillman [2001] 1 AER 91 CA, there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.'

[13] Therefore, whether the test that there must be a *real prospect of success* (*i.e.* realistic, as opposed to fanciful, prospect of success but no requirement that success should be probable, or more likely than not), should be adopted to determine leave to appeal and extension of time under section under section 20(1)(a) and (b) of the Court of Appeal Act is, at least seems arguable.

[14] On the other hand, in South Africa in order to succeed with their applications for leave to appeal to appeal, the applicants must satisfy the requirements of section 17 (1) (a) (i) and (ii) of the Superior Courts Act 10 of 2013 which sets out 'reasonable prospect of success' as the threshold. This section provides as follows:

> *"Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have reasonable prospect of success or (2), there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

[15] In **Smith v S** (475/10) [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) (15 March 2011), paragraph 7, a judgment by Plasket AJA for the Supreme Court of Appeal of South Africa (as he then was) said of 'reasonable prospect of success" as follows:

> *"What the test of reasonable prospect of success postulates is dispassionate decision based on the fact and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial Court. In order to succeed therefore the applicant must convince the Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be characterised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[16] To delve any further into this issue regarding the actual test under section 20(1)(a) and (b) of the Court of Appeal Act for leave to appeal and extension of time to appeal, this perhaps may not be the place or the time. However, I would formulate the question; is the test *real prospect of success* or *reasonable prospect of success*? Or whatever the label you attach is the test simply ***'whether the appellant has a realistic chance/prospect of success as opposed to fanciful or remote chance/prospect of success***?' in order to decide the question "*is there a ground of appeal that will probably succeed?"* The answer perhaps is 'yes'. If the threshold is too high, even meritorious appeals will fail at the leave/extension of time stage leading to injustice and prejudice to appellants and if the bar is too low unmeritorious appeals will get through and clog the Court's system leading to unacceptable delays in meritorious appeals reaching a finality.

[17] As for the merits of the appeal, it appears from the impugned ruling dated 30 July 2024 that the High Court judge had based his ultimate finding on an analysis of sections 169, 170 and 172 of the Land Transfer Act 1971. In terms of section 169 (a) of the Land Transfer Act, the appellant had to be the last registered proprietor of the land in issue. Otherwise he had no *locus standi* to institute the action. A certified copy of the Title marked 'A' had been annexed to the appellant's affidavit to prove that he was the last registered proprietor. However, the respondent's affidavit-in-opposition had stated that the appellant's annexure marked as 'A' clearly showed that his lease has been cancelled by Re-Entry No. 927101 on 30 November 2022 at 11.20 am by the Registrar of Titles. The High Court judge had examined 'A' and stated as follows:

> 5. *I note from the endorsement on Lease No. 248965 (NL. 9354) that Dealing no. 927101 through re-entry cancelled Lease No. 248965 (NL. 9354) on 30th November 2022. Which effectively cancelled the lease. Following the cancellation of the Lease the Plaintiff does not hold a lease and is not the last registered proprietor of the said property. The Plaintiff does not have locus to institute the proceedings against the Defendant. The Summon is dismissed. Cost is summarily assessed to be paid by the Plaintiff to the Defendant in the sum of $2000.00 within 30 days.*

[18] The Title marked 'A' is among the documents attached to the appellant's affidavit filed along with his summons in this court as part of annexure marked JVF1. The respondent

had submitted the same document to the High Court as 'NC4'. In addition, the respondent had submitted to the High Court an affidavit, two Notices and a Declaration dated 23 April 2021 authored and signed by the Assistant Estate Officer of the Land Department, Lautoka as part of the process of Re-entry by the Director of Lands on behalf of the State and more importantly the Re-Entry No. 927101 dated 01 July 2021 signed by the Director of Lands. Significantly, the Re-entry also bears the seal of the Registrar of Titles on 30 November 2022 at 11.24 am. The first page of Lease No. 248965 has the seal of cancellation of the lease made at 11.24 am on 30 November 2022 based on Re-Entry No. 927101.

[19] The appellant on the other hand argued in this court that the Transfer to the appellant the property concerned on 14 August 1992 under the hand of the Registrar of Tiles has not been yet cancelled on the face of the entry. Does it really matter? In my view, 'no'. There is an unequivocal cancellation of Lease No. 248965. The appellant has not challenged the said cancellation or the process involved in it or leading to it in terms of the law since 30 November 2022 to date. He cannot collaterally attack the validity of the cancellation in the current proceedings. Further, the appellant could not have raised totally new allegations associated with the cancellation of the Lease not set out in his founding affidavit in the High Court in his affidavit in reply.

[20] In the circumstances, I have no doubt of the correctness of the High Court judge's conclusion and the order of dismissal of the appellant's summons. The appellant has no realistic chance/ prospect of success on appeal. If at all, his chances could be categorized as fanciful or remote.

[21] When it comes the prejudice to the respondent, it has pleaded extensive legal cost and resources being allocated to defending the proceeding further if extension of time is granted without proof thereof. Apparently, the appellant has not yet settled the cost of $1000.00 ordered in favour of the respondent in Civil Action No. HBC 83 of 2020 which the appellant had filed against the respondent for the recovery of alleged rental arrears. Nevertheless, I do not see any irreparable or irrevocable prejudice that will be caused as a

result of allowing extension of time to file the appeal out of time. However, the question of prejudice weighs little when the appeal itself is totally unmeritorious.

Orders of the Court:

(1) Extension of time to file and serve a Notice of Appeal against the impugned High Court judgment dated 30 July 2024 is refused.

(2) Appellant is directed to pay $2000.00 as costs of this application to the respondent within 21 days hereof.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Lal Patel Bale Lawyers for the Appellant
Lateef & Lateef Lawyers for the Respondent