

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**Suva High Court Appeal No. HBA 02 of 2012**  
**Suva Magistrates Court Case No. 487 of 2010**  
**DS 527/10 SCT Claim No. 2561 of 2008**

**IN THE MATTER** of an appeal from the decision of the  
Magistrates Court in Civil Action 527 of 2010

**BETWEEN** : **MR MEHRAB BEGG T/A ELECTRONIC VISION** of Nabua,  
Suva, Businessman

**APPELLANT**

**AND** : **MS JOYCE HEERAMAN** of Laucala Beach Estate, Suva, USP  
Lecturer

**RESPONDENT**

**BEFORE** : **Hon. Justice Kamal Kumar**

**COUNSEL** : Appellant in Person  
Respondent in Person

**DATE OF RULING** : 28 August 2013

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## **RULING**

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### **1.0 INTRODUCTION**

1.1 On 8 August 2012 the Appellant filed Notice of Appeal against the decision by the learned Magistrate delivered at Suva on 5 July 2011 refusing Appellants Application for Leave to Appeal Out of Time the Order of Small Claims Tribunal made on 12 July 2010 ordering the Appellant to pay to the Respondent \$1,603.00.

1.2 On 16 April 2012 Appellant filed his Submission but did not serve it on the Respondent.

1.3 When this matter was called before me on 15 July 2013 I directed that:-

- (i) Copy of Appellant's Submission be given to the Respondent;
- (ii) Respondent filed and serve her Submission by 29 July 2013;
- (iii) Appellant to file and serve his Reply to Respondent's Submission by 6 August 2013;
- (iv) Ruling to be delivered on Notice.

1.4 Both parties filed their Submissions as directed.

## **2.0 GROUNDS OF APPEAL**

2.1 Grounds of Appeal as stated in Notice of Appeal are as follows:

- "1. The learned Magistrate erred in law and in fact in entering Judgment for the Respondent against the Appellant when there was clear evidence.*
- 2. The learned Magistrate erred in giving his decision without going into the merits of the case, weighing the evidence properly and making a considered decision.*
- 3. The learned Magistrate as stated in his ruling that I Maherab Begg has not explained why I have delayed in filing my appeal, the reason was that Miss Naaz filed the affidavit and has told the court that the affidavit is filed when she attended the Magistrate Court on 23<sup>rd</sup> of November, 2010. Your worship sir, as Miss Naaz was the administrator in my company and due to family commitment she had to be away in Labasa for couple of months and she handed all my company documents to one of my staff from where some of the documents went missing. Your worship, as the director of Electronic Vision, when I came to find out about this case, I was told that the affidavit did not reach my file. Sir, it took me time to study about the case as I was not aware of it. I took help from my solicitors to file affidavit and motion for leave to appeal out of time as Miss Naaz was away."*

## **Grounds 1 and 2**

2.2 Grounds 1 and 2 are not relevant as Judgment (Order) was entered by the Referee in the Small claims Tribunal matter not by the Learned Magistrate and therefore there was no need for him to evaluate any evidence or enter judgment in favour of the Respondent.

## **Ground 3**

2.3 The Learned Magistrate in respect to Application for Leave to Appeal Out of Time made the following findings:

*"The Affidavit was deposed by Maherab Begg and in his Affidavit he had set out his proposed grounds of appeal however he has not explained why the Appellants have delayed in filing the appeal.*

*The absence of an explanation as to why they are late in appealing is fatal to this application for leave to appeal out of time.*

*In the absence of any explanation as to why they have taken 8 months to appeal, the Court is not in a position to assess whether the delay has been reasonable or not therefore the application for leave to appeal out of time is refused."*

2.4 It is well established that the factors (which of course are not exhaustive) that needs to be taken into consideration when dealing with Application for extension of time and submitted by the Appellant in his Submission are:-

- (i) Length of delay;
- (ii) Reason for the delay;
- (iii) Chance of appeal succeeding if time for appeal is extended; and
- (iv) Degree of Prejudice to the Respondent if application is granted.

**CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704;  
**Norwich and Peterborough Building Society v. Steed** [1992] 2 ALL ER 830 at 83; **Ist Deo Maharaj v. BP (South Sea) Co. Ltd.** Civil Appeal No. ABU0051 of 1994S – FCA as page J.

2.5 Hence the Court must be given facts, in the form of evidence explaining and/or covering these four factors.

**Latchmi & Anor. v. Moti & Ors.** (1964) 10 FLR 138.

## 2.6 Length of Delay

In ***Revici v. Prentice Hall Incorporate & Ors.*** [1969] 1 ALL ER 772 – Lord Denning M R rejecting the Appellant’s submission that time does not matter as long as costs are paid stated as follows:-

*“Nowadays we regard time very differently from what they did in the nineteenth century. We insist on rules at time being observed. ... so, here although time not quite so very long, it is quite long enough.”*

In ***Revici’s*** case time for appeal had expired by one month.

Section 33(3) of Small Claims Tribunal Decree provides:-

*“An appeal shall be brought by a party by the filing of a notice of appeal in Form 6 of the First Schedule to this Decree, together with the fee prescribed in the Second Schedule in the High Court or any Magistrates' Court (as the case may be) within 14 days of the Tribunal's order.”*

In this instant Ruling by the Referee was delivered on 12 July 2010 as such time for giving notice of intention of appeal expired on 26 July 2010.

The Application for Leave to Appeal Out of Time was filed on 12 February 2011 that is seven and half months after the expiry date.

Obviously there has been inordinate delay by the Appellant in filing the Application in Magistrates Court.

## 2.7 Reasons for delay

Lord Davies in *Revici’s* case stated that:-

*“...rules are there to be observed and if there is non-compliance (other than a minimal kind), that is something which has to be explained away.*

*Prima Facie if no excuse is offered, no indulgence should be granted” (at 747 para F).”*

Application was refused in ***Revici’s*** case as no explanation for delay was given.

In ***1st Deo Maharaj*** – the Court of Appeal adopted with approval the following quote from ***Gallo v. Dawson*** [1990] 64 ALJR 458 at 459.

*“Case needs to be exceptional before a Court would enlarge by many months the time for lodging an appeal simply because the applicant had refrained from appealing until he/she had researched the issues involved. In Hughes v. National Trustees Executors & Agency Co. of Australasia Ltd [1978] VR 257, McInerney J pointed out (at 263) that one object of fixing times under court rules is “to achieve a timetable for the conduct of litigation in order to achieve finality of judicial determinations.” When the time for appealing has expired, the litigation is at an end; the successful party is entitled to the benefit of the judgment in his or her favour. At that stage, the successful party has a “vested right to retain the judgment”. It would make a mockery of O 70, r 3 if, months after the time for appealing has expired, the unsuccessful party could obtain an extension of time on the ground that he or she had delayed appealing because that person wanted to research the issues involved. Lack of knowledge is a misfortune, not a privilege.”*

In **Tevita Fa v. Tradewinds Marine Ltd. & Anor** – Civil Appeal No. ABU0040 of 1994 (FCA) – His Lordship Justice Thomson (as then he was) in dismissing Appellant’s application for extension to appeal made four days after the expiration of time to appeal stated:-

*“The application for leave to appeal was fixed only 4 days after the end of the period of six weeks. That is a very short period but time-limits are set with the intention that they should be observed and even lateness of only a four days requires a satisfactory explanation before an extension of time can properly be granted. In this case, as stated above, the applicant has given no explanation at all. That he may have been confused is merely an inference that Mr. Patel has asked me to draw from his statement of present belief that time began to run only from 8 August, 1994.”*

2.8 The Appellant at paragraphs 3 and 4 of his Affidavit sworn on 9 February 2011 and filed in support of his Application for Leave to Appeal Out of Time in Magistrates Court stated as follows:-

*“3. I make this affidavit in support of the Notice of Motion filed herein on behalf of the appellant seeking leave to this honourable Court for Leave to Appeal Out Of Time and for stay of execution against the decision of the Resident Referee Mr. J Sahai made on 12<sup>th</sup> July, 2010 to pay the sum of \$1603.00 to plaintiff within 60 days or to lodge an appeal to the Magistrate Court.*

*4. The grounds on which this leave to appeal out of time and stay of execution pending appeal is based as follows:*

1. *The Learned Referee gave no valid, no written reasons for his decision.*
2. *There was a breach of a right to a fair hearing.*
3. *The Learned Referee may have based his decision only on his biased decision.*
4. *The Learned Referee erred in giving his decision without going into the merits of the case, weighing the evidence properly and making a considered decision."*

2.9 It is obvious from the said Affidavit that the Appellant did not explain the reason for the delay which is as rightly stated by the Learned Magistrate fatal to Appellant's Application for extension of time.

2.10 Appellant has stated the reason for delay as part of Ground 3 of his Appeal.

2.11 This Court cannot take notice of that now as this Court only has determine whether the Learned Magistrate on the basis of the evidence before him exercised his discretion correctly.

2.12 The Appellant relied on the Fiji Court of Appeal case of **Jope v. Housing Authority of Fiji, Native Land Trust Board and Sainivalati Nasau** Civil Appeal No. ABU0042 of 1998 and quoted the following from it:-

*"Even more important than the absence of a satisfactory explanation for such a lengthy delay, which rightly could be classified as fatal to any application for leave is the obligation of the applicant to show that there is at least a reasonable chance of succeeding on appeal if leave were granted."*

2.13 In no way the Court of Appeal discounted the need or importance of the requirement by the Applicant to explain the reason for the delay.

2.14 This is clear from the words *"Even more important..."*. In fact in the last sentence of the paragraph preceding the paragraph quoted by the Appellant the Court of Appeal stated as follows:-

*"Counsel has offered no reasonable explanation for such a lengthy delay which rightly could be classified as fatal to any application for leave in such circumstances."*

2.15 In **Kamlesh Kumar v. State** Criminal Appeal No. CAV0001/09 and **Mesake**

**Sinu v. State** Civil Appeal No. CAV001/10 his Lordship the Honorable Chief Justice Gates, President of the Supreme Court of Fiji stated as follows:-

*"[7] The rights of appeal are granted by statute within a framework of rules. Enlargement normally can only be granted because of specific powers granted to the appellate courts. No doubt because of a need to bring litigation to finality, once there is non-compliance, the courts can only exercise a limited discretion. Viliame Caubati AAU0022.03S 14<sup>th</sup> November 2003 at p.5.*

2.16 His Lordship also quoted the following from Rhodes Cr App. R 35 at 36:-

*"A short delay may be disregarded by the Court if it thinks fit, but where a substantial interval of time a month or more elapses, it must not be taken for granted that an extension of time will be allowed as a matter of course without satisfactory reasons."*

2.17 I therefore find that Learned Magistrate did exercise his discretion according to established principles and did not err in striking out the Application for leave to Appeal Out of Time for failure by the Appellant to reasonably explain the delay.

2.18 The purpose and function of the Small Claims Tribunal was explained by his Lordship Justice Fatiaki (as then he was) in **Sheet Metal Plumbing (Fiji) Ltd. v. Deo** Civil Appeal No. 7 of 1999 (High Court Suva) where his Lordship stated as follows:-

*"The most obvious intention is that expressed in the long title of the Decree which reads: 'A Decree to Establish Small Claims Tribunals in Fiji, To Provide Prompt and Inexpensive Relief to Claimants.'*

*From this title alone one can discern the following 'legislative intentions':*

- (1) The Decree establishes 'Tribunals' not Courts;*
- (2) The nature of the cases with which the Tribunal is concerned are 'small claims';*
- (3) The central purpose of the Tribunal is 'to provide...relief to claimants'; and*
- (4) By a process that is both 'prompt and inexpensive'.*

*Other distinguishing features of a tribunal are:*

(a) *That it is presided over by a 'referee' who 'need not have legal qualifications' and whose primary function 'is to attempt to bring the parties in dispute to an agree settlement';*

(b) *Qualified and practising lawyers and professional advocates are excluded from its proceedings;*

*and*

(c) *Evidence before a tribunal 'need not be given on oath' nor need it be 'oral' or even originate from the parties to the dispute."*

From above it is clear that the very purpose for the establishment of Small Claims Tribunal is ensure that claims such as one subject to this proceeding is dealt expeditiously and without need for unwarranted litigation and costs for the parties.

2.19 To allow parties to drag matter in court after several months of its commencement in the Tribunal and Appellate Courts will defeat the purpose of establishing the Tribunal.

### **3.0 MERITS OF APPEAL**

3.1 Even if the Learned Magistrates did go beyond reason for delay and decided to look at the merits of the Appeal he would have been left with no choice but to dismiss the Application for Leave to Appeal Out of Time as Appellant had not provided any evidence to show his appeal falls within the ambit of the grounds for appeal provided in the Small Claims Tribunal Decree.

3.2 Section 33-(1) of the Decree provides that:-

*"Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal under section 15(6) or section 31(2) on the grounds that:*

*(a) the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or*

*(b) the Tribunal exceeded its jurisdiction.*

3.3 It is in no doubt the Claims before the Referee was within the jurisdiction of the Tribunal and therefore ground is in subsection (1)(a) is relevant only.



- 3.4 No evidence had been provided by the Appellant to the Court below to show that the Referee conducted the proceedings in a manner that was unfair to the Appellant and prejudicially affected the result of the process.
- 3.5 In fact in the Objection to Grounds of Appeal filed by the Respondent in Magistrates Court she states that the Referee adjourned the proceedings on three occasions at the insistence of the Appellant's representative and finally heard the matter on 12 July 2010 (4<sup>th</sup> occasion) and made the Orders.

#### **4.0 PREJUDICE TO THE RESPONDENT**

- 4.1 Public Policy demands that a litigant should not be deprived of fruits of his/her judgment.
- 4.2 In **Avery No. 2 v. Public Service Appeals Board & Ors.** [1973] 2NZLR 86 his Lordship Justice Richmond at page 92 stated:-

*"The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on other persons involved."*

- 4.3 His Lordship Justice Marsack JA in Latchmi's case stated:-

*"In deciding whether justice demands that leave should be given, care must, in my view, be taken to ensure that the rights and interests of the Respondent are considered equally with those of the Appellant."*

- 4.4 Respondent submits that her claim in Small Claims Tribunal was commenced in 2010.
- 4.5 I note from the Copy Records of the Magistrates Court that the Application for Leave to Appeal Out of Time was only filed after the Respondent issued and served Judgment Debtor Summons on the Appellant.
- 4.6 As stated in paragraph 2.17 of this Ruling I find that the Learned Magistrate did

not err in exercising his discretion in refusing the Appellant Leave to Appeal Out of Time and even if he would have considered other factors such as merits of Appeal and prejudice, Application filed by the Appellant on grounds stated in his Affidavit in Support was doomed to fail.

**5.0 CONCLUSION**

5.1 I make the following orders:-

- (i) Appeal against the decision of learned Magistrate delivered on 5 July 2011 in SCT Appeal No. 527/10 is dismissed and struck out.
- (ii) Appellant do pay Respondent's costs of this Appeal assessed in the sum of \$800.00.

**KAMAL KUMAR**  
**JUDGE**

**At Suva**

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