

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLANT JURISDICTION

CIVIL NO. HBM 61(B) of 2012

BETWEEN : Abhay Kumar Singh

DEFENDANT/APPELLANT

AND : Attorney-General of Fiji

PLAINTIFF/RESPONDENT

COUNSEL : Appellant in Person
: Ms. Ramoce L with Ms. Baleimatuku for the Respondent

Date of Judgment : 18 September 2013

JUDGMENT

1. This is an application for leave to appeal out of time and the intending appellant seeks leave of this court to bring an appeal out of time against the decision delivered in Magistrate Court Case No. 413 of 2011 and the Magistrate Court case could be stayed pending the hearing and determination of Appellant's application and or appeal.
2. The proposed appeal is against the decision of the Magistrate Court in which the learned Chief Magistrate arrived at the decision to dismiss the strikeout application filed by the appellant. The Defendant Appellant filed the strike out application on the following grounds:

“That the within action be wholly struck out on the ground that:

- (i) No leave was obtained from Honourable Court to issue proceedings against the Defendant now a Resident of Queensland Australia.*
- (ii) That this Honourable Court has no jurisdiction to preside over matters in respect of any proceeding in respect of or related to administration of Legal Practitioner’s decree 2009.*

Alternative

- (b) That this action be transferred to the High Court under section 32 of the Magistrate Court Act Cap 14.*
- (c) That the Plaintiff be ordered to pay cost of this application on indemnity basis.*
- (d) That the service and hearing of this notice of motion be abridged to one day.*

3. The decision of the Magistrate Court was delivered on 29 May 2012 and the Appellant filed his application for extension of time on 4 July 2012. Magistrate Court Act requires that the Notice of intention to appeal should be filed within seven days and the grounds of appeal within one month from the date of the decision. The Appellant should therefore have filed his notice of intention of appeal on or before 5 June 2012 and grounds of appeal on or before 29 June 2012. The Appellant filed his summons for extension of time on 4 July 2012. The Appellant’s application is therefore delayed by 29 days from the date that notice of intention to appeal should have been filed.

The Determination

4. Order 59 of the High Court rules deals with the application for leave to appeal out of time.

(i) Order 59 Rule (2) of the High Court Rules states:

“(1) An application to enlarge the time period for filing and serving a notice of appeal or cross appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.”

(ii) Order 59 Rule 10(2) of the High Court Rules state (Extension of time):

“(2) An application under paragraph (1) shall be made by way of an inter parte summons supported by an affidavit.

5. The Fiji Court of Appeal in **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund [2010] FJCA 3**; Miscellaneous Case 020 of 2009 (3 February 2010) stated that:

“It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal.”

6. In **1st Dep Maharaj v Burns Philip (South Sea) Company Ltd, Civil Appeal No. ABU 51 of 1994S** citing the judgment of Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880 CA it was said:

“The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:

(a) The length of the delay;

(b) The reasons for the delay;

(c) The chances of succeeding if time for appealing is extended; and

(d) The degree of prejudice to the Respondent if the application is granted.”

7. In **Every v Public Services Appeal Board (No. 2) (1973) 2 NXLR 86** it was said:

“Everything is left to the discretion of the court on wide basis that leave may be granted in such cases as 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.”

8. Gates J in **Loks Crane and Contractors Ltd v Clutch Systems (Fiji) Ltd [2002] FJHC 306**; HBM0031.1999L (17 July 2002) in similar application as:

*“The rule permits the application for enlargement in civil appeals to be made straight to the High Court upon the applicant’s election, as was done here; **Shiu Narayan v Bhajan** [1963] 9 Fiji LR 139 at p140. This rule is more generous than Rule 26 (3) of the Court of Appeal Rules Cap. 12 where the first application for leave must be made to the court below. The High Court still have been approached subsequently to exercise a concurrent jurisdiction if the applicant had elected to apply first to the Magistrate’s Court and had been refused; **A-G v Yee Noon** [1964] 10 Fiji LR 249 at p 251.*

9. In view of the clear guidelines set out in the above authorities, I now consider the application of the applicant for consideration of grant of leave to appeal out of time.

The Length of the Delay

10. It is clear that the Appellant is delayed by 29 days. It is noted that lateness of 29 days requires a satisfactory explanation before an extension of time can be properly granted. There had been instances where courts of Fiji have considered even a longer period of delays subject to reasons for the delay.

11. In the **Registrar of Titles v Prasad [2001] FJCA 5; Abu0009D.2001s** (8) June 2001), there was a delay of 12 months and Madam Shameem J as a single Court of Appeal Judge stated that:

“However, I accept the submissions of counsel for the Appellant that the appeal is not necessarily doomed to failure, and that he has at least an arguable case that the commercial loss to the Respondent, calculated on the basis of the improved value of the land, should not have awarded to him.”

The Reasons for Delay

12. The Appellant has deposed in his affidavit that there had been several correspondences between him and his solicitor regarding the ruling. He further deposed that he had been informed by the solicitor’s clerk that the ruling has not been given on 29 May 2012.
13. He also submits the copies of e-mails sent to his solicitors to ascertain the status and the outcome of the case. The main contention of the Appellant is that he be not deprived of his appeal due to mistakes on the part of his solicitor or counsel.
14. *“The solicitors or counsel who carelessly and without adequate justification allow the time for filling a notice of appeal to pass, may well be held responsible. The refusal of an application to extend the time may well result, to be followed by an action for negligence against the solicitor or counsel which may be impossible to resist.”* **Per Justice Tompkins JA in Native Land Trust Board v. Ponipate Lesavua & Subraman, FCA, Civil Appeal ABU0001 of 2004.**

15. In **Winstanley v Winstanley (1998) EWCA Civ 807** referring to the case **Gatti v Shoosmith (1939) 3 All ER 916** it was said:

“An extension of time can be granted, in appropriate circumstances, even though the failure to appeal in time was due to a mistake on the part of a legal adviser.”

16. Fiji Court of Appeal also considered the above position in the case of **Herbert Construction Company (Fiji) Ltd V Fiji Natural Provident Fund [2010] FJCA 3**; MIS case 020. 2009 (3 February 2010).

The Appellant’s Chance of Success

17. The onus is on the Appellant to establish that there is an arguable ground and chances of appeal succeeding if the application for leave to appeal out of time is granted.
18. The Appellant argues that the appointment of the receiver was void after court of appeal granted an interim stay and status of the receiver was also challenged. The issue of jurisdiction was also raised and arguable.
19. In my view, at this stage, it is not my duty or function as to go into the actual merits of the appeal. In considering the facts and circumstances which lead to this application, appeal is not wholly unmeritorious or unlikely to succeed. I conclude that there is a serious question for adjudication as opposed to it being frivolous and vexatious.

Prejudice to the Parties

20. The substantive matter arises in the recovery of \$11, 259.00 from the Appellant. There had been delays on the part of the Respondent in taking

certain decisions. Issue of jurisdiction should be determined prior to the substantive matter. In my view, there will not be serious prejudice caused to the Respondent if the leave of appeal out of him is granted.

Application for Stay

21. The manner in which the discretion to grant or refuse as a stay has been considered in several judgment of Fiji Court of Appeal and Supreme Court.

*“The **Supreme Court in Fiji Public Service Association v Public Service Commission [2009] FJSC 10**; CBV0002.2009S (1 April 2009) stated the principle regarding stay of the Fiji Court of Appeal judgment as:*

(1) The overriding principle of any stay application is that of upholding the interests of justice in the particular circumstances. The principal ground for the application in the current proceedings is that unless a stay is granted the appeal may be rendered nugatory for those public servants who have already reached the age of 55.

[2] The earliest that an appeal to the Supreme Court could be heard and determined in June this year and, absent a stay, the persons in this category could be dismissed in the meantime. The respondents say that they could “always rejoin the civil service.... And get compensation for any loss that they may suffer.” In my view that is very problematical. It seems unlikely that they would be re-employed, at least not in the same position, and loss of employment cannot always be compensated by the payment of money.

[3] The affidavits and counsel today have sought to canvas in some detail the merits of the Court of Appeal decision, but it is not part of

my function to form any opinion, preliminary or otherwise, as to the likely outcome of an appeal to the Supreme Court.

[4] *“Arguable” doesn’t mean a winning argument. It is not a particularly high hurdle for an application for a stay to jump.”*

22. Having considered the guidelines set out in the above judgment, I conclude that the appeal will be nugatory if stay as prayed for is not granted.

Orders

1. The application for leave to appeal out of time is allowed.
2. The application for stay pending the hearing and determination of the application is granted.
3. The notice of appeal is to be filed within seven days from today.
4. Costs of this application shall be costs in the appeal.

Susantha N. Balapatabendi
JUDGE