

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Miscellaneous Action No.: HBA 29 of 2015
LTA Tribunal Appeals No. 35 and 36 of 2006

BETWEEN : **RAJENDRA DEO PRASAD**

APPLICANT

AND : **LAND TRANSPORT AUTHORITY**

1ST RESPONDENT

AND : **PREM CHAND & SON t/a DWARKA BUSES LIMITED,**
PREM CHAND & SONS LIMITED and PARMOD ENTERPRISES

2ND RESPONDENTS

Counsel : **Mr. A. Pal for Applicant**
Mr. E. Radrole for the 1st Respondent
Mr. V. Kapadia for the 2nd Respondent
Date of Hearing : **8th February, 2016**
Date of Judgment : **26th February, 2016**

JUDGMENT

INTRODUCTION

1. This is an Originating Summons filed by the Applicant seeking extension of time for appeal against the decision of the Land Transport Tribunal (LTT). The decision of the LTT was handed down on 10th July, 2015. The Originating Summons seeking extension dated 20th October, 2015 was filed on the 2nd October, 2015. The Applicant had earlier

filed an application seeking leave to appeal against the same determination of the LTT and this was withdrawn and struck off and costs ordered against the Applicant, but these costs were not paid at the time of the hearing and no explanation was given for that failure. LTT held that though there were some procedural irregularities considering the circumstances and complex nature of the events at that time it decided not to interfere with the decision.

ANALYSIS

2. There is a right of appeal against the decision of LTT contained in the section 48 of the Land Transport Act 1998 to the High Court. There is no specific time period stated but Order 55 rule 4(2) of the High Court Rules of 1988, states that notice of appeal should be entered and served within 28 days. It is an admitted fact that this requirement was not fulfilled, hence the present application seeking an extension of the time.
3. An appeal from the LTT can be made only on question of law, in terms of Section 48 of the Land Transport Act 1998.
4. Order 55 rule 4(4) of the High Court Rules of 1988, specifies the manner in which the time should be calculated. In this instance the determination of LTT was on 10th July, 2015 and the 28 day time period expired on 7th August, 2015.
5. It was agreed between the parties that the Applicant could seek extension of time period for appeal in terms of Order 3 rule 4 (1) of the High Court Rules of 1988, since there was no appeal filed within the 28 day time period, and it reads as follows;
'4(1) The Court may, on such terms as it thinks just , by order extend or abridge the period within which a person is required to authorized by these rules, or by any judgment, order or discretion to do any act in any proceedings..'
6. According to the above provision there is general discretion granted to the court for extension of time in appropriate circumstances. Fiji Supreme Court in *Native Land Trust*

Board v Khan [2013] FJSC 1; CBV0002.2013 (decision on 15 March 2013)
(unreported) His Lordship the Chief Justice held,

‘[3] In applications of this kind appellate courts consider five factors to ensure a principled approach to the exercise of a judicial discretion.

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?*

The Reason for the failure to file within time

7. The affidavit in support of this application address this issue in the following manner

“Reasons for non-compliance and period of non-compliance/length of delay

- 1. I had demonstrated that I intended to appeal the Decision and my solicitors had filed appeal papers within the 28 days permitted albeit the application was for leave to appeal and not the actual appeal as per the requirements.*
- 2. The effect of this was that by the time the error was brought to light, the time for filing the appeal had passed.*
- 3. I do however asset that this demonstrates my intention to appeal.*
- 4. In so far as this application is concerned, I believe that I have brought this application within a reasonable period of time. This application had been filed within 7 days of the August application being withdrawn for the stated reasons.*
- 5. In this time my counsel has put together the proper application and has filed.*
- 6. I am of the view that there has not been any length delay in bringing about this application after the August application was withdrawn.*
- 7. Further to this the counsel for the Respondent were made aware of our intention to bring this application on 25 September 2015 when my counsel withdrew the August application. This was made known in Court.”*

8. There is a reason for the delay and that was due to the wrong application that resulted in the failed attempt to seek leave to appeal from this court. This might be due to a lapse on the part of the solicitor, but there is no explanation as to why it happened or how it happened.
9. Instead the Applicant is stating in his affidavit in support, that since he had filed the aborted leave to appeal, the Respondents were aware of his intention to appeal. This is far from any explanation as to the reason for the failure to compliance. The delay has to be calculated from the expiration of 28 days from the date of determination of LTT and the delay was nearly 2 months.
10. Why it took such a long time to realize the correct procedure is not explained. The affidavit in support filed by the Applicant lacks explanation other than stating that he filed a wrong application to the court and the Respondents were aware of his intention. This is not sufficient explanation for the delay to exercise the discretion in favour of him.
11. In *Native Land Trust Board v Khan [2013] FJSC 1; CBV0002.2013* (decision on 15 March 2013)(unreported) Chief Justice Gates analyzed the affidavit evidence contained in the affidavit in support, as to the reason for the delay and finally held that

'[26] I find the reasons advanced in the instant case inadequate, and the delay has not been satisfactorily explained'.
12. In that case the reason for delay was due to resignation of senior legal officer attached to the head office who had conducted the matter previously. Even in that instance the facts stated in the affidavit in support were analyzed by the Fiji Supreme Court and held that reasons were inadequate for extension. The delay in that case was 3 months.
13. The Applicant only stated that he filed wrong application and tries to justify it by stating that because of that the Respondents were aware of his intention. This is far from giving any explanation as to the delay.

14. His Lordship Gates CJ in *Native Land Trust Board v Khan* [2013] FJSC 1; CBV0002.2013(supra) cited several local as well as UK authorities and held,

[27] The delay here is over 3 months. In Ahilya Sharma & Anor. v Mahendra Pratap Singh (unreported) Civil Appeal ABU0027.03S, 11th November 2004 the Court of Appeal when considering an application for enlargement of time within which to file an application for leave to appeal to the Supreme Court said (pp7-8):

"An intending appellant to the Supreme Court who is faced with an adverse judgment of this court must act with promptitude."

[28] In Ahilya Sharma, the court considered 40 days "a significant period of delay", and refused to extend time. The lateness was only 11 days in Avery v No. 2 Public Service Appeal Board and Others [1975] 2 NZLR 86, yet when considering the whole history of the matter, leave was refused. The appeal was 47 days late in Latchmi v Moti [1964] 10 Fiji LR 138 at p.147B, and leave was rejected.

[29] But then in Norwich and Peterborough Building Society v Steed [1991] 1 WLR 449 the delay was 6½ months. Though it was felt prejudice would occur to the Respondent, leave was granted. There had been considerable difficulty and delay in obtaining legal aid assistance for the appeal. In Gatti's case leave was given since there had been a very short delay, a few days only, and notice had already been given to the Respondents' solicitors.

[30] Every case turns on its own special facts, though the principles for approaching such applications remain the same and all must be weighed.

15. In *Gatti v Shoosmith* [1939] 3 All ER 916 the extension for the time period was allowed when the delay was due to a mistake on the part of the lawyer, in misconstruction of the law. In that case the delay was only few days, while allowing the extension held, (per Sir Wilfrid Greene MR, at p919)

'On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say "may be," because it is not to be thought that it will necessarily be exercised in every set of facts'.

16. The Applicant in his affidavit in support did not mention the reason for filing leave to appeal instead of an appeal. In the circumstances I am not inclined to attribute the fault to the lawyer, but if it was his fault when did he realized the fault should be stated. According to the affidavit in support this application was filed 7 days after withdrawal of the previous application. The delay has to be explained clearly by the applicant as it cannot be left for speculation. By the same token when the mistake was realized was also an important factor, if not any legal practitioner could violate the time constraints with impunity and could file an application for extension long after expiration of time. This was clearly not an anticipated result.
17. The following facts are essential to exercise the discretion and they are; When did the Applicant or his lawyer came to know about the fault? What was the reason for the said mistake? If so what measures were taken to mitigate such delay? Did the Applicant file the present application as soon as the mistake was known? All these are factors that need to be considered in the exercise of discretion in favour of the Applicant for an extension, but the affidavit in support or the annexed documents did not address the said issues.
18. In *Gatti v Shoosmith* [1939] 3 All ER 916 at 920 Greene MR held, (with Mackinnon, Finlay LJJ agreeing);
- The reason for the appellant's failure to institute his appeal in due time, was a mere misunderstanding, deposed to an affidavit by the managing clerk of the appellant's solicitors—a misunderstanding which, to anyone who was reading the rule without having the authorities in mind, might very well have arisen. The period involved is a very short one, it is only a matter of a few days, and the appellant's solicitors, within time, informed the respondent's solicitors by letter of their client's intention to appeal.(emphasis is mine)*
19. The above decision was applied in the Fiji Supreme Court in *Native Land Trust Board v Khan [2013] FJSC 1; CBV0002.2013* (decision on 15 March 2013)(unreported) It had emphasized the need to explain the failure to comply. In the *Gatti v Shoosmith* [1939] 3 All ER 916, a law clerk had explained the delay that resulted the misunderstanding of the law that caused the delay and Greene MR stated that the misunderstanding happened in

that case could have happened to anyone. That finding was possible because of the explanation given by the law clerk in the affidavit. In contrast the Applicant in his affidavit in support is silent on the issue as to why a wrong application was filed and when it was realized and what measures were taken after that. It only states a wrong application was filed earlier, and after 7 days from the withdrawal of wrong application, the present application for extension was filed.

20. The reasons for the delay cannot be brushed aside as done by the Applicant in this affidavit in support considering the delay was nearly two months. His Lordship Gates CJ in *Native Land Trust Board v Khan [2013] FJSC 1; CBV0002.2013* (decision on 15 March 2013)(unreported) considered the facts contained in the affidavit in support relating to the reason for delay and refused to accept the same. His lordship also considered the decision of Byrne J in *Minister of Tourism and Transport v Tower Insurance (Fiji) Ltd and 3 Others* (unreported) Civil Appeal ABU0032.01 12th November 2001 in the said decision.
21. Fiji Court of Appeal in *Minister of Tourism and Transport v Tower Insurance (Fiji) Ltd and 3 Others* (supra) Byrne J analyzed the affidavit in support regarding the reasons for the delay in detail and held that it lacked sufficient explanation for extension of time.
22. So, all the local decisions as well as UK authority emphasized the need to consider the affidavit in support in order to ascertain whether there was a sufficient explanation for delay. The affidavit in support of the Originating Summons lacks explanation for extension of time. It is not sufficient for the Applicant to say that delay was due to his own failure to file correct application to the court, and say no more!

The length of delay

23. The length of delay has to be calculated from the 28 days from the determination of LTT and this would be from 7th August, 2015 to the date on which this application seeking extension was filed (i.e. 2nd October, 2015). The delay was nearly two months.

24. The affidavit in support only states that the present application for extension was filed within 7 days from the withdrawal of the previous application. This is not the yardstick to consider the delay. The delay has to be calculated from the expiration of 28 days from the determination of LTT. Why could not the Applicant file the present application for extension of time when the previous application was withdrawn was not explained? It seemed the Applicant is taking a very relaxed attitude when he was already delayed for nearly 2 months. Even after withdrawal of defective proceedings a further 7 days were taken. I cannot see any reason to delay further 7 days when the previous proceedings were withdrawn by the solicitor. In the absence of any plausible explanation and there is none, the only conclusion that I could come is that the Applicant does not consider compliance of rules as vital requirement.
25. At the same time the applicant had failed to pay even the costs ordered for the previous leave to appeal application that was withdrawn. This was alleged in the affidavit in opposition of the 2nd Respondent at paragraph 6. The costs ordered were only \$100 for each Respondent, but that was not paid even as late as hearing of this application. His Lordship Gates CJ in *Native Land Trust Board v Khan [2013] FJSC 1; CBV0002.2013* (decision on 15 March 2013)_(unreported) held that an extension was granted in *Gatti v Shoosmith* [1939] 3 All ER 916 as it was a very short delay of few days (see para 29 of the Fiji Supreme Court Judgment). In sharp contrast the Applicant's delay was nearly 2 months.
26. Fiji Court of appeal in *Fa v Tradewinds Marine Ltd and Anor* (Unreported)(Civil Appeal No ABU0040 of 1994, decided on 18th November,1994) Thompson JA held that even 4 days delay should be satisfactorily explained.(This was applied in Fiji Court of Appeal Case of *Kalisito Maisamoa V The Chief Registrar* ABU 18 of 2014 (unreported) (decided on 26.02.2016).
27. In *Fa v Tradewinds Marine Ltd and Anor* (Unreported)(Civil Appeal No ABU0040 of 1994, decided on 18th November,1994) Thompson JA held,

*'This 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 a **satisfactory explanation before an extension of time can be granted.** In this casethe applicant has given no explanation at all'* (emphasis added)

28. **Gatti v Shoosmith** [1939] 3 All ER 916 was followed in a UK case **Palata Investments Ltd and others v Burt & Sinfield Ltd and others** [1985] 2 All ER 517. In that case Ackner LJ (with Robert Goff and Browne-Wilkinson LJJ agreeing) at p521 held,

'as a general rule the appellant should not be deprived of his right of appeal and so no question of the merits of the appeal will arise. We wish to emphasise that the discretion which fell to be exercised is unfettered, and should be exercised flexibly with regard to the facts of the particular case. No doubt in some cases it may be material to have regard to the merits of the appeal, because it may be wrong, and indeed may be an unkindness to the appellant himself, to extend his time for appealing after he has allowed the time to elapse, to enable him to pursue a hopeless appeal'.

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

29. Before I embark on this I would like to quote a guidance for drafting of grounds of appeal contained in the Fiji Court of Appeal in **Nasese Bus Company Ltd v Chand** [2013] FJCA 9; ABU40.2011 (8 February 2013) (per Calanchini P)

' Drafting grounds of appeal

*.....This can only be achieved if the Appellant states in his notice of appeal the findings of fact and points of law which will be in issue on appeal. **Although the notice should state the precise order which the Court of Appeal will be asked to make, this should not result in lengthy or elaborate notices of appeal. Detailed reasoning should not be included'**. (emphasis added)*

30. In this Originating Summons the Applicant had attached proposed notice of appeal and contained 8 grounds of appeal. I can't see merits in appeal grounds 5 and also 6 on the face of it. The appeal ground 7 contained certain facts under (a) to (e) and the Respondents alleged that those were factually incorrect.

31. Though this is not a hearing of an appeal, I observed that these facts were not stated in the decision of LTT and they were contentions by the Applicant. For example Appeal Ground 7(a) and (b) states that the Board refused the transfer application on 6th March, 2006. There was no such thing stated in the decision of LTT and this was a question of fact as seen by the Applicant from the circumstances and not contained in the decision of the LTT. Since the appeal grounds needs to be confined to the question of law this is not acceptable as a ground of appeal. In any event there was no finding as to refusal of transfer application in the decision of LTT.
32. I do not wish to elaborate the grounds more for obvious reasons, but did so in order to assess the merits of the proposed appeal.
33. The LTT considered the facts and circumstances as they were presented and held that though there were some procedural irregularities that was not sufficient to overturn the decision after 9 years, considering the other factors like the circumstances at that time and the paramount consideration of providing uninterrupted transport service to public.

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

34. Since the delay of nearly 2 months is substantial the grounds of appeal were not sufficient to pass the threshold of merits in this application seeking extension. The reasons given previously in this judgment are sufficient and no need to repeat the same here.
35. The decision of the LTT could be appealed only on the question of law and I could not see a ground of appeal that will probably succeed to overturn a decision of LTT. One has to be mindful of the creation of special tribunal and wide discretion granted in Sections 46 and 47 of the Land Transport Act 1998. The tribunal can make an order that is '*just and reasonable*' (see Section 46 (2) of Land Transport Act 1998) and it '*shall have regard to those matters which the Authority is required to have regard to in considering an*

application' under the said Act (see Section 47 of Land Transport Act 1998). So LTT can rely on matters like public good and need to have uninterrupted transport service.

Is there a Prejudice to the Respondents

36. I can't see any prejudice being the determinant issue in this application. The Respondents were uncertain about the executed decision 9 years ago, but that uncertainty did not deter them from conducting their activities as usual for last 9 years.

CONCLUSION

37. The delay of the Applicant was nearly 2 months and the affidavit in support states the Applicant filed a wrong application earlier. This earlier application was a leave to appeal and it was subsequently withdrawn and cost of \$100 for each Respondent was ordered against the Applicant, but he did not comply with said order. The affidavit in support does not explain the reason for the delay. I cannot see merits in the proposed grounds of appeal to quash the determination of LTT that will result an administrative decision taken and acted upon it for 9 years being quashed. There is a discretion granted to the court in the exercise of extension of time. This is an unfettered discretion. Some guidelines were set by Fiji Supreme Court in the exercise of the discretion to extend the time period. The discretion to extend time should be exercised to prevent injustice to a party. Considering the circumstances, I cannot see injustice to the Applicant by refusal. Though he has *locus standi* to bring an appeal no such injustice was apparent from facts. I cannot see merits to overturn the decision of the LTT. Fiji Court of appeal in *Shah v Fiji Island Revenue and Customs Authority et* (ABU0001 of 2007) decided on 4th July, 2008, Byrne, Pathik and Hickie JJA) held, 'the Court will expect adherence to the Rules save in the absence of special circumstances'. There are no special circumstances in this Originating Summons. Fiji Court of Appeal in *Rupeni Silinuana Momoivalu v Telecom Fiji* (ABU 0037 of 2006, decided on 7th September, 2007) Byrne, Pathik and Mataitoga JJA held that litigants who choose not to follow the rules were doing so at their peril. So I am not inclined to use the discretion in favour of the Applicant to extend the time. In the

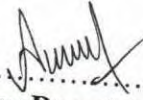
circumstances the Originating Summons is struck off. The cost of this application is summarily assessed at \$1,000 for each Respondent. (Total \$2000)

FINAL ORDERS

- a. The Originating Summons is dismissed and struck off.
- b. The cost of \$2000 is ordered summarily assessed (\$1,000 for each Respondent)

Dated at Suva this 26th day of February, 2016




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Justice Deepthi Amaratunga
High Court, Suva