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

Action No.: HBC 159 of 2013

BETWEEN : **SEVANAIA VEILAVE** of Lot 17, Makosoi Estate, Pacific Harbour, Driver, as the father, the intended Administrator and next friend of his late daughter namely **ADI KELERA MARAMA** infant, deceased, intestate.

APPLICANT/PLAINTIFF

AND : **SALVEEN SACHIN NAICKER** of Nawaka, Nadi, Driver.

1ST RESPONDENT/1ST DEFENDANT

AND : **NAIM ENGINEERING CENDERA CONSRCUTION LIMITED** whose registered office is at Level 2, Jet Point, Supa Centre, Martintar, Nadi.

2ND RESPONDENT/2ND DEFENDANT

Counsel : **Ms. Chetty for the Applicant/Plaintiff**
Mr. A. K. Narayan for the 1st and 2nd Respondent/1st Defendant
Date of Hearing : **8th February, 2017**
Date of Decision : **17th February, 2017**

Catch Words- Enlargement of Time- Leave to Appeal from Master's Ruling- High Court O 59 rule 8, rule 10 and 11 and Order 3 rule 4(1)- Exercise of Discretion to extend time – principles- interlocutory order-strike out – amendment of pleadings- Order 18 rule 18 of the High Court Rules of 1988.

DECISION

INTRODUCTION

1. This is a summons filed by the Plaintiff seeking extension of time to file leave to appeal against the Master's decision. The Master had struck off the Plaintiff's action in terms of Order 18 rule 18 of the High Court Rules of 1988. The Plaintiff is the parent (next of kin) of the deceased child and in this action he is seeking compensation for special damages for medical expenses, damages for pain and suffering, damages under Compensation to Relatives Act (Cap29) and also under Law Reform (Miscellaneous Provisions)(Death and Interest) Act (Cap27) for loss of prospective earnings. The action was filed on **31st May, 2013.** According to the Statement of Claim the death was due to the motor accident

happened on **30th May, 2010**. The Plaintiff had not obtained Letters of Administration at that time of the institution of the action and subsequently it was obtained. The Plaintiff had filed this action as 'intended Administrator **and Next Friend**' of the deceased. A statement of Defence was filed without taking any legal objections to the said statement or claim and or to Writ of Summons. After consenting for summons for directions, orders of the court were made in terms of that and the Plaintiff's Affidavit verifying list of Documents was served. Then, the Defendants sought to amend the statement of defence on 4th April, 2014 and the Plaintiff objected to it. After several adjournments the hearing of the said summons seeking amendment to the defense, was fixed on 12th November, 2014 **but it was stayed** as the Defendant had filed later; summons seeking strike out of the action. While directions were made regarding the summons seeking strike, the Plaintiff sought to amend the writ of summons on 25th November, 2014. While this summons to amendment of the writ, was pending the summons for seeking strike out was heard on 16th March, 2014 and by Ruling delivered on 11th November, 2016 action was struck off.

2. The Plaintiff filed a purported Appeal and Notice and Grounds of Appeal against the said Ruling on 24th November, 2016. This is within 13 days from the delivery of the Ruling. (The Ruling of the Master delivered on 11.11.2016). This was abandoned, sometime after 24th November, 2016 before 2nd December, 2016,as the Ruling delivered by the Master could not be classified as a 'final order' in line with the decision of Fiji Court of Appeal in ***Goundar v Minister for Health*** [2008] FJCA 40; ABU0075.2006S (9 July 2008)(unreported).

3. The summons seeking leave to appeal out of time was filed on **2nd December, 2016** and it was served to the Defendants on 18th January, 2017 and the Hearing was conducted on 8th February, 2017. The Respondents-Defendants (the Defendants) objected to this application and they filed written submissions at the hearing. The Plaintiff did not file any submissions.

ANALYSIS

4. The summons filed on 2nd December, 2016 sought following orders

   a. The **Appellant be given Leave to Appeal** out of time against the ruling of the Acting Master dated 11th November, 2016.

   b. The **time be enlarged** for the Appellant (sic)to appeal out of time against the ruling of the Acting Master dated 11th November,2016.(emphasis added)

5. According to the summons, application seeking extension of time for Leave to Appeal was filed in terms of Order 59 rule 8(1). The counsel for the Defendant stated that the said rule 8(1) was not the correct provision and stated that leave to appeal out of time was made in terms of Order 59 rule 10(1). He took a preliminary objection to the said failure to mention Order 59 rule 10, in the summons filed on 2ndDecember, 2016. There is no allegation of prejudice to the Defendant from the said omission on the part of the solicitor for the Plaintiff. There was no affidavit in opposition filed by the Defendants.

6. The Order 59 rule 8 of the High Court Rules of 1988 states as follows

   *'8(1) An appeal shall lie from a **final order or judgment** of the Master to a single judge of the High Court.*

   *(2) No appeal shall lie from an interlocutory order or judgment of the Master to a single judge of the High Court without **the leave of a single judge** of the High Court which **may be granted or refused** upon the papers filed' (emphasis added)*

7. The Order 59 rule 8(1) had no application to the Ruling of the Master delivered on 11.11.2016. It was an interlocutory order in line with Fiji Court of Appeal decision of ***Goundar v Minister for Health*** [2008] FJCA 40; ABU0075.2006S (9 July 2008)(unreported). So, leave is required for an Appeal from the said Master's decision. The Order 59 rule 8(1) only deals with final orders, so I agree that it is irrelevant to the present application.

8. Now I venture to High Court Rules relied by the Defendants. Order 59 rules 10 and11 of the High Court Rules of 1988 states as follows

'10.-(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 expiration of that period.*

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

Application for leave to appeal (O.59, r.11)

11. Any application for leave to appeal an interlocutory order or judgment shall be made by summons with the supporting affidavit, ***filed and served*** *within 14 days of the delivery of the order or judgment.'* (emphasis added)

9. The Order 59 rule 10 applies to the enlargement of time for **Notice of Appeal** or **Cross Appeal** and has no relevance to the Summons filed by the Plaintiff seeking extension of time for Leave to Appeal. It should be noted that both Order 59 rule 10(2) and rule 11 required the service of the application.

10. Neither Order 59 rule 8(1) nor Order 59 rule 10(1) allows the High Court to grant extension of time for leave to appeal against interlocutory decision. The Order 59 rule 11 deals with the leave to appeal and there is no mention of enlargement of time or regarding such application for enlargement of time.

11. Since neither side could point out specific law, it is the general provision contained in Order 3 rule 4 of the High Court Rules of 1988 that should be relied on for the Summons filed on 2nd December, 2016 seeking extension of time for leave to appeal against the Master's Ruling

12. The Order 3 rule 4 of the High Court Rules of 1988 applies. It states as follow;

'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 or authorized by these rules,*** *or by any judgment, order or direction, to do any act in any proceeding'. (emphasis added)*

13. So, in the summons filed on 2nd December, 2016, sought two reliefs, and the first is extension of time in terms Order 3 rule 4(1), and second, is to seek leave to appeal against the interlocutory order delivered on 11.11.2016, in terms of Order 59 rule 11. By 2nd of December, 2016 the time for an application for leave to appeal fell short by about 1 week, in terms of the said rule 11.

14. The consideration for granting leave to appeal outside the time period specified in the law, are set out in the Fiji Court of Appeal and also in the Supreme Court. But I was not submitted any case that dealt Order 3 rule 4 of the High Court Rules of 1988 to extend time period for leave to appeal.

15. It is an exercise of discretion of the court, and there can only be guide lines and rigid rules may curtail the exercise of the discretion of the court and may result injustice and curtail the access to justice on mere technicalities leaving the pertinent legal issues (merits) high and dry. In my opinion though the rules of the court needed to be followed the discretion of the court should not be in favour of dismissal of a matter when there are merits. There are obviously, differences of opinion on the said exercise of discretion, and no rigid rules can substitute this reality. When a party failed to perform a particular act in the specified time it may be due to one reason or culmination of several reasons and in many instances there will be some form mistake or fault on the part of the solicitor. If a mistake of lawyer is excluded as a reason, many a deserving and meritorious application may be dismissed. Though it may be a path of least resistance to dispose numerous applications for extension of time, I am not inclined to take that path. In my judgment such an approach would also not be in accordance with Section 15 of the Constitution of Fiji. The access to justice should not be denied unless there is specific impediments where discretion of the court is denied or curtailed e.g. Limitation Act (Cap 35).

16. ***Emanuel v Australian Securites Commission*** 144 ALR 359 Kirby J stated,

> *'In many cases which depend upon the meaning of legislation found to be ambiguous, strong arguments can be assembled for the competing points of view. So it has proved in this appeal. We deceive ourselves in such cases if we pretend*

that there is only one available interpretation. The judicial task is to seek out and to declare the preferable construction of the legislation. Only then does it become the one interpretation which the law holds to be correct.'

17. There are judgments of the this court as well as Fiji Court of Appeal and even Supreme Court of Fiji dealing with the non-compliance of rules relating to Leave to Appeal . If one considers all of them they may not be coherent and there may be some difficulty in reconciling. I do not propose to venture such an exercise in this decision, but suffice to state discretion granted to High Court in Order 3 rule 4 of the High Court, is unfettered.

18. As stated earlier both parties relied on High Court Rules (i.e Order 59 rules 8,10 and 11) that did not deal with the power of the court to extend the time period for leave to appeal.(i.e. against interlocutory order). So, there is some uncertainly, regarding the scope of the application seeking extension of time for leave to appeal against a Master's interlocutory decision, if one only considers the submissions of the counsel in this case. This has caused some further issues as to the time of service of such application. There is no specific time line for the requirement for service of summons under Order 3 rule 4(1), as opposed to the Order 59 rule 10 and rule 11 as discussed earlier.

19. Interlocutory orders were often made while the action was pending before the court and finality to orders of the court are essential for progress of the trial. This reasoning will not be always used to all the interlocutory decisions, when the classification is based on Fiji Court of Appeal Case ***Goundary Minister for Health*** *(supra)*. Some interlocutory decisions will have final effect, though they are classified as interlocutory. A good example is this case. There is no pending action in the court after interlocutory Ruling delivered on 11.11.2016.

20. The Master by Ruling delivered on 11.11.2016 had struck off the action. In the exercise of my discretion the decisions of the Courts are used as a guide line, though they are not exhaustive, but at the same time mindful of the recent trends in regard to failure to comply the procedural requirements or technicalities.

21. There cannot be rigid law preventing the exercise of the court's discretion on a matter which will deny a party its right to come before the court, if there is some injustice. This is specially so, if an action is struck off before hearing for non-compliance of a requirement that could be cured through an amendment.

22. In ***One Hundred Sands Ltd v TeArawa Ltd*** [2015] FJHC 487; HBC112.2014 (30 June 2015) Alfred J in the High Court, had quoted following passage from ***Ratnam vs. Cumarasamy and Another*** [1964] 3 All E.R. at page 935; (Lord Guest in giving the opinion of the Board to the Head of Malaysia s)

> *"The 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 requires 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.*** *The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal was entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant. In these circumstances, their lordships find it impossible to say that the discretion of the Court of Appeal was exercised on any wrong principle."* (emphasis is mine)

23. His Lordship Alfred J in High Court, had used this judgment to refuse an extension of time for leave to appeal against an interlocutory decision and His Lordship Ajmeer J in High Court, had also used the said quote to refuse a similar application for extension time for leave to appeal against a Master's decision, in ***Mohammed v Khan*** 2015] FJHC 728; HBC67.2014 (2 October 2015). It should also be noted neither Alfred J nor Ajmeer J considered the Order 3 rule 4(1) of High Court Rules of 1988 in the abovementioned decisions for extend the time period for extension of time for an interlocutory decision.

24. The quote, in ***Ratnam vs. Cumarasamy and Another***[1964] 3 All E.R. 935 used by both Alfred J and Ajmeer J, did not prohibit enlargement of time. While emphasizing that enlargement could not be readily granted, without any reason, stated '*there must be some*

material on which the court can exercise its discretion'. In my judgment if there is material that could justify the reason for delay it, could be accepted irrespective of delay is attributable to a solicitor. Whether the material or reasons for delay is sufficient to grant an extension is left with the judge in the exercise of discretion. The time period for delay, the reason for delay and merits of the leave to appeal are considered and the cumulative effect of all the said grounds are considered in the exercise of discretion to extend the time period.

25. About three decades after ***Ratnam vs. Cumarasamy and Another*** [1964] 3 All E.R. 935 was pronounced, ***Finnegan v Parkside Health Authority*** [1998] 1 All ER 595 the identical provision to High Court Order 4(1) in UK (O.3 r.5) was extensively considered. In that case (Hirst LJ) number of previous decisions (including ***Ratnam vs. Cumarasamy and Another*** [1964] 3 All E.R. at page 935) that had different outcomes were discussed and concluded as follow (p 604)(Per Hirst LJ)

> *'At the end of the day, the key criteria in the present case were guidelines 2 and 10 as laid down in the Mortgage Corp case, showing that the* ***overriding principle was that justice should be done****, and that in considering whether to grant an extension of time the court would look at all the circumstances including the other considerations mentioned in that judgment.*

Further held (p 604)

> ***'In my judgment the starting point is RSC Ord 3, r 5 itself, which explicitly confers the widest measure of discretion*** *in applications for extension of time, and draws no distinction whatsoever between various classes of cases....'* (emphasis added)

26. Before arriving at the said conclusions Hirst LJ in ***Finnegan v Parkside Health Authority*** [1998] 1 All ER 595 at 596 considered number of decisions that discussed the exercise of discretion under O.3 r.5 in UK (analogous to Order 3 rule 4(1) of High Court Rules of 1988) in detail, and I would quote some of them for completeness and also those UK decisions are helpful as guiding principles for the use of discretion under said High Court Rule.

At pages 598-599 (Per Hirst LJ)

> *'In the leading judgment with which Stuart-Smith and Simon Brown LJJ agreed Bingham MR stated as follows ([1993] 1 All ER 952 at 959–960, [1993] 1 WLR 256 at 263–264):*
>
> *'We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary.* ***The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed.*** *The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The* ***second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.*** *This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.* ***Neither of these principles is absolute.*** *If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.* ***The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb.*** *A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do*

justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.' (emphasis added)

At pages601- 602 (Per Hirst LJ)

".....in Mortgage Corp Ltd v Sandoes [1996] TLR 751, [1996] CA Transcript 1634, which was originally reported in the Times Newspaper on 27 December 1996. In that case the plaintiff was seeking an extension of time for the exchange of witness statements and expert's reports. The appeal was from the decision of Astill J, who had refused leave on the footing, as described by Millett LJ, that unless there were good reasons for the failure to comply with the rules or directions of the court the discretion to extend time would not be exercised.

Millett LJ, with whom Potter LJ and Sir Christopher Slade agreed, expressly ***rejected the argument*** *based on Astill J's approach that the* ***absence of good reason was always and in itself sufficient to justify the court in refusing to exercise its discretion,*** *and held that the true position was that once a party was in default, it was for him to satisfy the court that*

despite his default, the discretion should nevertheless be exercised in his favour, ***for which purpose he could rely on any relevant circumstances****. There then followed (at 752) a most important passage where the court laid down general guidelines as follows:*

'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.' (emphasis added)

27. In the exercise of my discretion under Order 3 rule 4(1) of the High Court Rules of 1988 I have the power to enlarge the time period for an application for Leave to Appeal against the Master's Ruling dated 11.11.2016.I have considered the guiding principles laid in the exercise of general discretion in Order 3 rule 4(1) (analogous to O.3 r.5 of R.S.C UK).

28. The counsel for the Defendant stated that though the summons filed on 2nd of December,2016 was only 7 days outside the time period for seeking leave, it was not served on them till 18th January,2017, thus 54 days delay in the compliance of Order 59 rule 11, quoted earlier in this judgment. As I have stated earlier in this judgment Order 59 rule 11 has no relevance to this application.

29. The Order 3 rule 4(1) there is no explicit requirement to serve the application within a specified time. It is desirable and prudent practice to serve, the summons for extension of time under said provision in any matter where the other party is already before the court. It is a matter of prudence or good practice. This has to be done without an inordinate delay. At least a week before the day fixed for the first mention date in court of the summons filed on 2nd December, 2016. There was no material before the court that prejudice has caused to the Defendants by the said failure to service the summons promptly.

30. Since there was no explicit requirement for service under Order 2 rule 4(1) of the High Court I would consider general provision regarding the service is sufficient. So, the delay that needed enlargement was one week. (i.e the date of filing of the summons seeking extension of time, not the date of service)

31. In ***WakayaVs Chambers et al*** (unreported) (decided on 10th November, 2011) Fiji Supreme Court (Gates CJ) quoted the following passage from ***Emanuel v Australian Securites Commission*** 144 ALR 359 Kirby J

> *'There is a reason for the tendency in the series of cases cited by McHugh JA in Woods v Bate... and in other cases to like effect, for the reluctance of courts in recent times to invalidate acts done pursuant to a statutory condition. Courts today are less patient with merit less technicalities.* ***They recognize the inconvenience that can attent an overly strict requirement for conformity to procedural preconditions. In the morass of modern legislation, it is easy enough, even for skilled and diligent legal practitioners*** *(still more lay persons who must conform to the Law)* ***to slip in complying with statutory requirements.....An undue rigidity in insisting upon strict compliance with all of the procedural requirements of the law could become a mask for injustice and a shield for wrong-doing."*** *(emphasis is mine)*

32. In the ***Wakaya Vs Chambers et al*** (unreported) (decided on 10th November, 2011) Fiji Supreme Court (Per Gates CJ) held in favour of the applicant, of the leave of the Supreme Court. In that case one party was not served at all and the other party was served one day late in terms of Supreme Court Rules. The merits of the case were considered and special leave to Supreme Court was granted. The delay of service and non-service was directly attributable to the solicitor of mistake of fact and law.

33. So the paramount consideration is injustice to the party seeking leave and merits of the appeal grounds. More weight is given to such grounds though delay and explanation for delay are considered and a cumulative effect is taken.

34. The Solicitors for the Plaintiff purportedly file Notice and Grounds of Appeal, on 24th November, 2016, under the pretext that Ruling which struck off the action was a final order. It was also served to the Defendant. So the Plaintiff had indicated in no uncertain terms that the Ruling of the Master delivered on 11.11.2016 would be appealed. Later, having realized the Ruling delivered on 11th November, 2016 was an interlocutory, had filed the Summons seeking leave to appeal out of time. (see paragraphs 18-20 of the Affidavit in Support of the Summons).

35. So, by the time it was realized, the appeal was abandoned and filed the present summons on 2ndDecember, 2016. This was clearly a mistake on the part of the solicitors for the Plaintiff in the classification of the Ruling delivered on 11.11.2016.

36. In many an instance solicitors had made mistakes about this classification between 'interlocutory' and 'final' decision. If this mistake by the lawyers are not recognized as a reason for delay, even a meritorious leave to appeal would not be rejected and injustice is evident.

37. The counsel for the Defendant argues that such a mistake cannot be considered as a valid ground for delay in line with Fiji Court of Appeal decision (Gunaratne JA) in ***Clark v***

Zip Fiji [2014] FJCA 189; ABU0003.2014 (5 December 2014). ***Singh v Khaiyub*** [2014] FJCA 190; ABU0009.2014 (5 December 2014)(Per GunaratneJA)(unreported) and ***Ghim Li Fashion (Fiji) Ltd v Ba Town Council*** *[2014] FJCA 192; Misc. Action 03.2012 (5 December 2014)*. (all unreported).

38. First these Fiji Court of Appeal decisions did not consider the exercise of discretion in terms of Order 3 rule 4(1) of the High Court Rules of 1988. Second, the Fiji Supreme Court in ***WakayaVs Chambers et al*** (unreported) (decided on 10th November, 2011) held that even non service of notice, which was obviously a fault of the solicitors could be curable considering the merits of the case. In the said judgment it was held that '*filing and service could constitute the commencement of the appeal'* (see paragraph 46 of Gates CJ's decision).

39. It should be noted that unlike the, the Supreme Court Rule that was discussed in ***Wakaya*** (supra), there was no explicit requirement for service and time period in the Order 3 rule 4(1) of the High Court Rules of 1988. So, the delay in service is not a ground to dismiss this summons and there is no delay of 54 days as contended by the counsel for the Defendants.

40. In ***Wakaya*** (supra) the Fiji Supreme Court had allowed an application for special leave when the solicitor had failed to serve the application within the stipulated time period under. In that case the application seeking leave from the court was filed within the time period but was not served to parties within time. In the said judgment Gates CJ held that in terms of the Supreme Court Rule dealing with the lodgment and service the application seeking leave was required to be filed and served within 42 day time period , but having considered merits, granted the leave to appeal. This Supreme Court decision was not considered in the Fiji Court of Appeal decisions ***Clark v Zip Fiji*** *[2014] FJCA 189; ABU0003.2014 (5 December 2014)*. ***Singh v Khaiyub*** [2014] FJCA 190; ABU0009.2014 (5 December 2014) and ***Ghim Li Fashion (Fiji) Ltd v Ba Town Council*** *[2014] FJCA 192; Misc. Action 03.2012 (5 December 2014)*.(all unreported).

41. So, there is no rigid rule as contended by the counsel for the Defendants, that if the delay is a result of a fault of the solicitor it should be rejected as a reason for delay. There is establish jurisprudence in Fiji as well as in UK that the paramount consideration in extension of time and or leave is merits, though some explanation as to delay is needed. There is no case that I know of that a legal mistake similar to classification of orders, by a solicitor was considered as invalid reason for delay, as contended by the Defendants.

42. The grounds of appeal as stated in the affidavit in support are as follows.

"The Appellant/Plaintiff intends to rely on the following grounds of appeal:

1. THAT the Acting Master of the High Court erred in law and in fact by nullifying the Writ of Summons filed on 31st May, 2013 under the Order 18 Rule 18 application filed by the Defendants.

2. THAT the Acting Mast of the High Court erred in law and in fact by failing to consider that the Plaintiff is the biological father of the deceased and by virtue of being the biological father of the Plaintiff has standing/locus standii to institute proceedings.

3. THAT the Acting Master of the High Court erred in law and in fact by failing to consider that the Plaintiff has a reasonable cause of action by virtue of being the biological father of the deceased and the sole beneficiary in the deceased's estate. In her judgment, Ms. Bull stipulated that:

> *"In any event, I consider neither Section 5 nor 10 of the Compensation to Relatives Act can assist the Plaintiff. .....though the Plaintiff could not have commenced the action as an administrator under Section 6(1) € of the Succession, Probate and Administration Act Cap 60, and Section o4 of the Compensation to Relatives Act Cap 29, he is entitled to bring action under Section 10 of the Compensation to Relatives Act".*

She further stated that **"there is in this case nothing before me to say either that the Plaintiff is the sole beneficiary or that he is bringing the action on behalf of any other beneficiary..."**

4. THAT the Acting Master of High Court erred in law and in fact in failing to consider that the terms "father", "intended administrator" and also "next friend" were used in the intituling enabling him entitlement as Plaintiff to institute this action pending grant of Letters of Administration.

5. THAT the Acting Master of the High Court failed to consider the pending application filed by the Plaintiff on 25th November 2014 for leaves to amend Writ of Summons filed on 31st May, 2013, thereafter the grant of Letters of Administration was obtained by the Plaintiff. The Acting Master, Ms. Bull in para 58 – 59 states that "...the proposed amendment does not in any way cure the irregularity from the beginning ....in the circumstances, I find that the writ in this action is invalid and struck out accordingly".

   (a) That the holdings of the learned Master could not be upheld because the learned Master was wrong in entering ruling in view of the materials before the Court which clearly showed that the appellants had meritorious claim. Annexed hereto and marked "I" is a copy of the Notice of appeal.

43. I do not propose to deal with the said grounds in detail but suffice to consider there are any merits in the said appeal at least regarding to the appeal ground dealing with Section 9 of the Compensation to Relatives Act (Cap29).

44. Though not exhaustive in the exercise of discretion under Order 3 rule 4 of High Court Rules 1988 the following may be considered and their cumulative effect is taken and they are

   a) the interests of the of justice and specially the failure to exercise extension and consequences . Eg. If the failure to enlarge time would result denial of access to a party.
   (b) whether the application for extension has been made promptly.
   (c) whether the failure to comply was intentional, for e.g. non-compliance of unless order or after an extension of time delaying taking further steps.
   (d) whether there is a good explanation for the failure.
   (e) The conduct of the party seeking extension prior to the said application. The extent to which the party in default has complied with rules, court orders or any unless orders were made prior or in this instance.
   (f) whether the failure was caused by the party or his legal representatives. E.g. mistake of law or fact
   (g) Effect of extension have on the trial, if the action is still pending before the court.
   (h) the effect which the failure as opposed to granting extension, on all the parties including interest of public if any.

(i). If the extension will result in an appeal or leave to appeal the merits or the prospects of such application.

(j) The effect of extension on case management and right of a party for determination of a civil action without delay.

(k) Whether the defect is curable, and if so the prejudice to other party.

45. In my judgment the discretion of the this court can be utilized to extend the time period for the leave to appeal against the interlocutory decision for following reasons;

a. Due to mistake of law, an Appeal was filed instead of seeking leave to appeal on 24.11.2016 and soon realized the mistake and filed the present application seeking extension of time for leave to appeal.

b. The Summons seeking extension of time for Leave to Appeal was filed soon after realization of the mistake of law by the solicitors and the enlargement of time was required for 7 days.

b. The access to justice should not be restricted solely, due to a mistake of law by the solicitors as classification of orders to final and interlocutory is a task left to the legal practitioners.

c. If there are merits for the leave to appeal, sometimes *nunc pro tunc* is used to consider the Appeal as leave to appeal (see ***Emanuel v Australian Securites Commission*** 144 ALR 359). The ratio of decision of Gates CJ in ***WakayaVs Chambers et al***(unreported) (decided on 10th November, 2011) Fiji Supreme Court also supports *'nunc pro tunc'* principle where a party had failed to serve a party at all.

e. There is no affidavit filed by the Defendants alleging any prejudice if an extension is granted for the leave to appeal.

f. There is no allegation of delay on the part of Plaintiff by the Defendants at the hearing.

g. If the extension is not granted the Plaintiff's action remains struck off.

h. There is no material before me that extension would cause any prejudice to the Defendants.

i. It was Defendant's stayed application for amendment of the statement of defence even after filing the Plaintiff's that resulted this .

46. The learned counsel for the Defendants- Respondents (Defendants) at the hearing said the non-compliance of the Section 9 of Compensation to Relatives Act (Cap29) requirement could be cured by an amendment to the statement of claim, but he said no such amendment was sought by the Plaintiff in their summons for amendment which was pending before the court when the summons for striking out was heard. The counsel for the Defendants stated that the Master had considered the material filed by the Plaintiff seeking amendment in the Ruling delivered on 11.11.2016, while striking out, though the summons for striking out was not heard. According to the Defendants, since there was no application for amendment seeking rectification of deficiency of the requirement for Section 9 of Compensation to Relatives Act (Cap29), the striking out was the only option available. I humbly do not agree with that submission.

47. The Order 18 rule 18 of the High Court Rules of 1988 states as follows;

> *'18(1) The **Court may** at any stage of the proceedings **order** to be **struck out or amend any pleading** or the endorsement of any writ in the action, or **anything in any pleading** or in the endorsement, on the ground that- ..... "(emphasis added)*

48. So, there is ample provision for the court to amend *'any pleading'* or ***anything in any pleading***, *ex meromotu* if it is a curable defect. If striking out can be saved from such an endeavor in order to prevent injustice to the litigant, it should be explored first.

49. As a matter of practice, it if there is an application for amendment and striking out it may be convenient to consider the application for amendment together or before the striking out. At the same time there is nothing preventing the court from exercising its power to order amendment of the statement of claim or writ, in lieu of striking out as striking out in the first instance for non-compliance of a rule is rare.

50. If an amendment could cure the deficiency of the requirements contained in Section 9 of the Compensation to Relatives Act(Cap 29), why that opportunity was not given to the Plaintiff was not explained in the, otherwise well-reasoned determination of the Master delivered on 11.11.2016.

51. The Section 9 of Compensation to Relatives Act (Cap 29) states as follows;

> *'In every such action the plaintiff on the record shall be required to deliver to the defendant or his barrister and solicitor, together with the statement of claim, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered'.*

52. The Plaintiff had brought the action as *'next of kin'* of the deceased and this is stated in the writ of summons. The Writ of Summons also stated that he was the Plaintiff of the deceased child. So there are merits in the appeal on the ground whether it is mandatory to comply with Section 9 of the Compensation to Relatives Act (Cap 29) or it is a curable defect. The Master had relied on a decision of this court for this, but the facts and circumstances of the said case are different and there are merits in the said ground of appeal. At the hearing counsel for the Defendants admitted that requirement under Section 9 could be cured by an amendment, but there was no such an application by the Plaintiff.

53. Having considered the circumstances and reasons for the delay in my judgment there is sufficient explanation for me to allow extension of time. At the same time as I have considered that there are merits in granting leave to appeal against the ruling the leave to appeal is granted.

54. Having considered the circumstances of the case I do not wish to make any order as to costs, and each party should bear their own costs.

FINAL ORDERS

a. The time for filing leave to appeal against the Master's Ruling delivered on 11.11.2016, is enlarged.

b. The Applicant is granted Leave to Appeal out of time against the ruling delivered by the Master on 11.11.2016.

c. No costs.

Dated at Suva this 17th day of February, 2017

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Justice Deepthi Amaratunga

High Court, Suva