

IN THE HIGH COURT OF FIJI

AT SUVA

PROBATE JURISDICTION

Probate Jurisdiction No. **HPP 139** of 2022

IN THE MATTER of **MANIK CHAND** late
of Lot 3 Vunivivi Hill/ Ram Khelawan Road,
Nausori, Businessman, Deceased, Testate.

BETWEEN : **SAROJANI CHAND** of Vunivivi Hill, Nausori, Homemaker.
FIRST PLAINTIFF

AND : **ARVIN CHAND** of Melbourne, Australia, **ASHIKA LATA SAHIB** of Perth,
Australia and **DHINASH CHAND** of Nausori.
SECOND PLAINTIFFS

AND : **SATISH CHAND** of Nausori
DEFENDANT

BEFORE : **Hon. Justice Vishwa Datt Sharma**

COUNSEL: **Mr. Maharaj V.** for the Plaintiffs/Applicants

Mr. Singh R. with Mr. Low T. for the Defendant/Respondent

DATE OF DECISION: 21st January, 2026 @ 9.30am.

DECISION

[Leave to Appeal and Stay]

Introduction

1. The First Plaintiff/Appellant filed an Inter Parte Summons coupled with an affidavit in support on 14th April 2025 and sought for the following orders:
 - 1) The **Leave** be granted to Appeal the Judgment of the Honourable Justice Vishwa Datt Sharma delivered on 27th March 2025.
 - 2) The Substantive Hearing in the High Court and the orders made on 27th March 2025 be stayed pending the Determination of this Application and [if Leave is granted] the Appeal.
 - 3) That the costs of this application be costs in the Cause.

Substantive Action

2. On 27th March 2025, the Court delivered its Ruling that:
 - (a) *The Plaintiff's Notice of Motion seeking for the Chief Registrar to release the original Probate Grant No. 720029 with Will dated 24th July 2019 of the Deceased, Manik Chand to the Plaintiff for examination by the Writing Expert is dismissed in its entirety, and*
 - (b) *The Plaintiff to pay the Defendant summarily assessed costs of \$2,000 within 14 days' time frame*

Plaintiffs /Appellants Contention

3. The Plaintiffs deny that the proposed appeal lacks merits. The Plaintiffs have raised a total of nine (09) arguable Grounds of Appeal likely to succeed against the impugned judgment of the Court.
4. The Appellate Court would need to determine as a matter of law whether forgery needs to be specifically pleaded as stated in the impugned judgment or whether forgery is a subset of fraud as claimed by the plaintiffs and supported by Case Laws.
5. On the Defence objection that the Plaintiff's application is out of time, First Plaintiff at paragraph 6(b) of his affidavit has deposed that the Leave to Appeal was filed in a timely manner on 14th April 2025 well before expiry of 21 days allowed under the Rules.
6. However, except for the Affidavit in Support, the summons was not issued or released by the High Court Registry until Friday 25th April 2025, 8 days after expiry of 21 days required time frame.
7. Therefore, the service of the summons and the affidavit could not be affected on the Respondent within 21 days' time frame. As such, the Plaintiff's/Appellants should not be blamed or prejudiced by the late service. '*Actus Curiae Neminem GRAVABIT*' should be applied, that an act of the Court shall prejudice no one.

8. In absence of any formal objections by the Defendant in terms of **Order 2, Rule 2 of the High Court Rules 1988**, this Court has a discretion to cure defects in form and service under Order 2, Rule 1 to correct irregularities and under Order 3 and 4 to extend time.
9. With regards to what is claimed by the Defendant/Respondent tentamounts to legal matters, not within the knowledge of the deponent.

Defendant's/Respondent's Contention

Out of Time

10. **Rule 16 of the Court of Appeal Rules** provide that-

'subject to the provisions of this Rule, every notice of appeal or application for leave to appeal shall be filed and served under Rule 15(4) within the following period....., that is to say-

(a) in the case of the appeal from an interlocutory order, 21 days.'

11. Since the Interlocutory Ruling was delivered on 27th March 2025, an application for Leave to Appeal should have been **filed and served** by 17th April 2025, within 21 days' time period.
12. The Plaintiff's application was served on 28th April 2025, (11 days out of time), in non-compliance of the required High Court Rules.
13. Reference is made to the case of **Fiji Revenue and Customs Services v New India Assurance Company Ltd** [2019] FJSC 34; CBV 0020.2018 (15 November 2019)- The Court addressed the four factors for consideration in a case of **Leave to Appeal out of time** and stated in paragraph 10:

"The factors which, of course are not exhaustive, that needs to be taken into consideration when dealing with such applications are:-

- (i) **Length of delay,**
- (ii) **Reasons for the delay;**
- (iii) **Chance of appeal succeeding if time for appeal is extended or merits of;**
- (iv) **The case; and**
- (v) **Degree of Prejudice to the Respondent if application is granted."**

14. The Supreme Court stated in paragraph 7, that the Applicant/ Petitioner had:

"...filed a Notice of Motion seeking the following orders:

1. That Leave be granted to the Petitioner to serve **out of time** its Petition for Leave to Appeal..."

15. In discussing the factors related to the '**reasons for the delay**', the Court further held at paragraph 20,

Lord Davies in Revici's case stated that:-

"...rules are there to be observed in if there is non-compliance (other than minimal kind), that is something which has to be explained away. Prima Facie if no excuse is offered, no indulgence should be granted."

16. The Defendant/Respondent submitted that the Grounds of Appeal:
- lack substance to justify the granting of leave to appeal; and
 - purport to adduce new evidence that was never considered when the Plaintiff's Notice of Motion was filed.
17. Both parties to the proceedings furnished Court with their written submissions and case authorities and argued the application orally.

Determination

18. **Section 12(2)(f) of the Court of Appeal Act 1949** states:

"12(2) No appeal shall lie -

(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge of the High Court, except in the provisions provided for at 12 (2) (f) (i) - (v) inclusive.

19. The leading authority on the principles applicable to appeal against an interlocutory decision is **Kelton Investments Limited v Civil Aviation Authority of Fiji** [1995] FJCA 15; ABU 0034d.95s (18 July 1995) where the Court emphasized that Leave to Appeal will rarely be granted unless substantive rights are affected and substantial injustice will result.
20. In **Chandra v Permanent Secretary for Health** [2018] FJHC 1042; Civil Appeal 117 of 2014 (30 October 2018), the Court applied **Neimann v Electrical Industries Limited** [1975] VR 431 and held that an Applicant must in addition raise sufficient doubt to justify leave being granted. The Court state:

"(4) The principles which should guide a Court when sitting on appeal from a discretionary order were expressed by the full Court in "Neimann v Electrical Industries Limited", (1978) VR 431. They are:

- *The Order appealed from must be seen to be clearly wrong or, at least, attended with sufficient doubt as to whether it is right or wrong, and*
- *Substantial injustice be a direct consequence of the Order.*

21. However, as a General Rule, there is a strong presumption against granting Leave to Appeal from Interlocutory Orders or Judgments which do not either directly or by their practical effect finally determine any substantive right of either party.

22. *Rule 16 of the Court of Appeal* provides that-

"every Notice of Appeal or application for Leave to Appeal shall be filed and served under Rule 15(4)..... in the case of the appeal from an Interlocutory Order, 21 days."

23. The Ruling was pronounced on 27th March 2025, and the application for Leave to Appeal should have been filed and served on 17th April 2025. However, it was served on the Defendant on 28th April 2025 [11 days out of time].

24. The Plaintiff's explanation was that although the application for Leave to Appeal was filed in a timely manner on 14th April 2025 will be expiry of 21 days timeframe, the High Court Registry did not issue and release the Summons for service until 25th April 2025, 8 days after expiry period.
25. It was the Plaintiff's responsibility to continuously follow up on the issuance and delay of the application and upon release ensure to **serve** the application onto the Defendant within the required timeframe of the High Court Rules. The Rules are there to be observed and if there is non-compliance, it has to be explained. Prima facie, if no excuse should be offered, no indulgence should be granted.
26. However, the Plaintiff's explanation on timely service of Application on to the Defendant is unacceptable and I find that the Plaintiffs have failed to comply with the deadline timeframe set by the Court of Appeals Rules.
27. The Plaintiff's application is out of time. The Plaintiffs should have been aware that the High Court Rules 1988 provides that the application to seek '**Extension of time**' in order to comply with the Rules of the Court or provide any Excuse/ Justification for the delay, there has not been any reasonable explanation and or excuse.
28. Probate was granted vide application no. 70029 under the Will of the Deceased, 24th July 2019, which the Plaintiffs are challenging in this Court.
29. The Plaintiff's claim raises allegations related to the deceased's testamentary capacity and purported undue influence on the part of the Defendant, which obviously does not require a handwriting expert's assistance in Court's determination of the issued herein.
30. Further, forgery was not specifically pleaded in the Plaintiff's claim.
31. Prima Facie, a handwriting Expert can only assist in determining the similarities between various signatures and not the testamentary capacity of the deceased.
32. The Notice of Motion filed by the Plaintiffs relies on **Order 38, Rule 4 of the High Court Rules 1988**. The cited Rule only discusses the Court's powers to limit the number of expert witnesses and does not grant the Court power to order the High Court Registry to release the Probate Grant and the Deceased's last Will and Testament.
33. It's important and the responsibility of ensuring filing of the application is done correctly, citing under which particular order and/or provisions of the High Court Rules, the application is made and relied upon. If the rule cited is incorrect, then it needs to be corrected by a formal application.

New Evidence

34. **Rule 22(2) empowers the Court of Appeal** to grant leave to any party to Appeal to adduce new evidence on Appeal where it is alleged that any facts essential to the issue have come to light after the decisions of the Court below.
35. Reference is made to First Plaintiff, Sarojini Chand's Affidavit at paragraph 12, where reference is made to a report from Linda Morrell dated 11th April 2025, a handwriting

expert, that is only after the Interlocutory Ruling was delivered. This report however was never provided to Court or brought to Court's attention or to the Defendant when the Plaintiffs filed the Notice of Motion dated 17th January 2024.

No Substantial Rights/ Injustice

36. The Plaintiffs argued that 'the Interlocutory Ruling' refusing the release of the Original Will for examination undermines the Plaintiff's constitutional rights to a fair hearing and the proper administration of Justice as it prevents the Plaintiffs from testing the authenticity of the impugned Will by an expert witness.
37. So far, there is no evidence before this Court explaining why it is necessary or how it is related to what has been pleaded in the claim. Therefore, the Plaintiff's rights as claimed by the Plaintiffs will not in any way be compromised.
38. The substantive issue, claiming that the alleged Will was not duly executed in accordance with the provisions of the Wills Act 1972, can only be determined at trial with *viva voce* evidence. Therefore, since the substantive issue is very much akin and revolves around its execution, it is only appropriate that witnesses, including the Expert Witnesses, testify by *viva voce* evidence so that the necessary evidence(s) can be easily ascertained accordingly.

In Conclusion

39. Prima Facie, upon perusal of each of the nine (09) Grounds of Appeal, I find that it lacks merits and substance to justify the granting of Leave to Appeal and the Grounds purport to adduce new evidence that was never considered when the Plaintiff's Notice of Motion was heard.
40. The Plaintiff's application for Leave to Appeal was served out of time in breach of the Rule 16(a) of the Court of Appeal Rule.
41. The Interlocutory Ruling refusing the release of the original Will for examination does not undermine the Plaintiff's Constitutional Rights to a fair hearing and the proper administration of Justice as to will not prevent the Plaintiffs from testing the authenticity of the impugned will by an Expert witness. I reiterate that the Expert handwriting witness could either be subpoenaed to give evidence and/or choose to give his evidence via Skype proceedings.
42. For the aforesaid reasons, I refuse that the Plaintiff's application seeking for Leave to Appeal, the Interlocutory Ruling dated 27th March 2025, and accordingly dismiss the application.
43. Since Leave to Appeal has been refused and dismissed, I therefore need not deal with the stay application because there will be nothing to stay pending Appeal.

Costs

44. The matter proceeded to hearing on written submissions coupled with oral submissions.

45. It is only just and fair that the Plaintiffs pay the Defendant's summarily assessed cost of \$2,000 within 14 days' timeframe.

Orders

- i The Plaintiff's Inter-Parte Summons seeking for Leave to Appeal, the Ruling delivered on 27th March 2025, is hereby refused and dismissed in its entirety.
- ii The Plaintiffs to pay the Defendant's summarily assessed cost of \$2,000 within 14 days' timeframe.

Dated at Suva this 21st day of January ,2026.




VISHWA DATT SHARMA
PUISNE JUDGE

- cc. Vijay Maharaj Lawyers, Suva
Munro Leys Solicitors, Suva