

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0039 OF 1997

(On Appeal from the High Court of Fiji at
Lautoka in Civil Action No. HBC 276 of 1996/L)

BETWEEN:

CHANDRA SAMI

f/n Yenkat Sami

Appellant

and

PARWATI NARAYAN

f/n Yenkat Sami

Respondent

Mr I. Fa for the Applicant

Dr M.S. Sahu Khan for the Respondent

Date and Place of Hearing: 24 July 1997, Suva

Delivery of Decision: 8 August 1997

DECISION

(Chamber application to enlarge time for appeal)

This is an application for leave to appeal out of time.

On 7 February 1997 Judge Lyons made an oral Order giving vacant possession to Respondent (Original Plaintiff) of the premises occupied by the

Applicant (Original Defendant) in Ba. He did so summarily under the provisions of S.169 of the Land Transfer Act noting that "Fraud not good enough as evidence". He recorded that he would give full reasons later.

His Order was sealed on 17 February 1997. It was served on the same day.

It is not in dispute that Judge Lyons' written reasons were not received by the Applicant's Counsel by fax until July 10 1997, although Counsel kept enquiring about it.

In the meantime the Applicant filed a stay application in the High Court in an endeavour to prevent being evicted under a writ of possession. The stay application was fixed for hearing on 18 July 1997.

On 16 July 1997 the Applicant filed in this Court 2 ex-parte motions - one for a stay order and the other for leave to appeal out of time. He also filed a Notice of Appeal. I refused to deal with the applications on an ex-parte basis and treated the Notice of Appeal as a proposed Notice. I adjourned the 2 applications for inter-partes hearing.

On 24 July 1997 Mr Fa informed me that he had obtained a stay order in the High Court on 18 July 1997 pending the decision of this Court. He therefore sought a ruling on the leave application only and was not pursuing the stay application in the meantime.

Dr M.S. Sahu Khan, Counsel for the Respondent, opposed the leave application relying on his oral submissions and the affidavit in reply of one Suresh Chand.

Applicant's case

Mr Fa's contention is that he did not know the reasons for the judgment until he received a copy of the decision by fax on 10 July 1997. Neither he nor his client in any way contributed to the delay in receiving the judgment. He says as soon as he received a copy of the judgment he took immediate action. He further submits that having regard to his submissions in the Court below on questions of law and on disputed facts coupled with the allegation of fraud, Section 169 procedure was inappropriate for disposal of the action. He contends that he has a very good case for appeal. He therefore argues that it would be a denial of justice if his client were refused an opportunity to file a late appeal.

Respondent's contentions

On the other hand Dr Sahu Khan contends that time should not be extended because vacant possession order was sealed and served on 17 July 1997. Furthermore the Applicant was present in Court when the verbal order was made on 7 February 1997.

Dr Sahu Khan pointed out that in any case the Applicant had 42 days to apply to the High Court for extension of time but failed to do so. No proprietary right or interest was shown in the Court below. Respondent

received everything under her father's will and the will was never challenged at any time before the present Action in the High Court. The onus was on the Respondent to show cause and this he failed to do under Sections 169 and 172 of the Land Transfer Act. Furthermore extension of time is not lightly given, he submitted.

Dr Sahu Khan cited in support of his argument the judgment of Justice Marsack in The Commissioner of Inland Revenue and James Michael Ah Koy, FCA Civil Appeal No. 19 of 1973. In this (Ah Koy's) case the Applicant did not file any affidavit in support of his application for leave to appeal after the time fixed for appeal had expired, to explain the reasons for the delay of 5 months. The Court also noted that the rights and interest of the Respondent should also be taken into account along with those of the Applicant.

Marsack J. decided not to exercise the Court's wide discretion in favour of the Applicant because he found 'no satisfactory explanation for the delay of several months ---- and no other ground upon which the interests of justice demand that extension of time asked for should be granted'.

Dr Sahu Khan also referred to the judgment of the Court of Appeal in Kenneth John Hart v Air Pacific Ltd., Civil Appeal No. 23 of 1983 where the Court refused extension of time because, inter alia, there was inordinate and unexplained delay and the Applicant had not exhibited any sense of urgency.

Court's views

In the present case I am satisfied that the Applicant had shown some

urgency through his Counsel as is revealed by affidavits filed in support, that he took immediate steps to seek extension of time soon after receiving a copy of the reasons for judgment and the delay, which has not been inordinate, has been reasonably explained. As to the prospect of the appeal succeeding, all I can say is that prima facie the proposed appeal is arguable.

Under normal circumstances the Applicant would have had 42 days from 17 February 1997 within which to file a Notice of Appeal. The last day for filing the appeal as of right would have expired on 31 March 1997.

Although the delay in the particular circumstances of this case was not inordinate this is not to condone some laxity on the part of the Applicant's Counsel in not moving the Court for an extension of time before the expiry date. But I accept that Applicant's Counsel would have had difficulty in this case in formulating precise grounds of appeal in the absence of a written judgment. Inability to formulate precise grounds of appeal is not a bar to applying for extension of time.

It is true that where an intended appellant fails to lodge an appeal within the time statutorily prescribed his status undergoes a radical change. He then carries a heavy burden to persuade the Court that the interest of justice require indulgence be granted to him. The rights and interest of the Respondent should of course also be kept in mind.

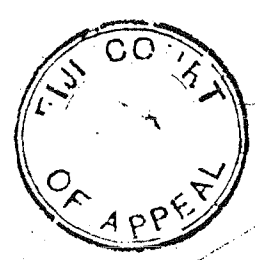
I must bear in mind that I am currently dealing not with a stay application but with an application for extension of time within which to

appeal. It is possible for a Court to grant extension of time but refuse a stay application, e.g. where the Court considers that damages would be an adequate remedy. Or the Court may grant a stay subject to certain conditions to protect the interest of the Respondent.

In my view the facts and circumstances of Hart's and Ah Koy's Case are somewhat different from the present one. A reasonable case has been made out to enable this Court to exercise its discretion in favour of the Applicant but the costs of the proceedings before me must be borne by the Applicant.

Orders

Leave to file appeal out of time granted. Notice of Appeal already filed on 16 July 1997 to be deemed to have been duly filed today. Applicant is to pay Respondent the costs of this application, which I fix at \$250.00. This sum must be paid within 10 days.



Moti Tikaram

Sir Moti Tikaram
President, Fiji Court of Appeal

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