

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CIVIL APPEAL NO. ABU 84 OF 2014**  
**(High Court HBC 276 of 2007)**

**BETWEEN** : **SURUJ KUAR** *Appellant*

**AND** : **VIJAY NAND SHARMA** *Respondent*

**Coram** : **Chandra RJA**

**Counsel** : **Mr. S. Singh for the Appellant**  
**Ms. S. Devan for the Respondent**

**Date of Hearing** : **3 June 2016**

**Date of Ruling** : **9 August 2016**

**RULING**

[1] This is an application for an extension of time for filing a notice of appeal pursuant to section 27 of the Court of Appeal rules. The application was made by summons filed on 10<sup>th</sup> December 2014. The application was supported by an affidavit sworn by Romil Prakash, a Legal Executive in the employ of the Appellant's Solicitors to which was annexed a scanned copy of the Appellant's affidavit stating further that the original could

not be filed as the document was being couriered from the United State of America and that the Original would be filed once it is has been received. The original affidavit was filed at the time that the application was taken up for hearing.

[2] Counsel for the Respondent objected to the filing of the original affidavit but agreed that the contents were the same. The Appellant was allowed to file the original affidavit.

[3] In her affidavit the Appellant had sought extension of time for filing a notice of appeal as well as a stay pending the appeal. The grounds of appeal were annexed to the said affidavit which set out the following grounds:

- “1. *The learned Judge erred in holding that the Plaintiff had proved his claim for specific performance on a balance of probabilities.*
2. *The learned Judge erred in law and in fact holding that the Defendant had failed to prove her defence of non est factum.*
3. *The learned judge erred in law and in fact in not properly evaluating the evidence of Civil Action No.133 of 2008 in which the Appellant had removed the second named Defendant from the proceedings as trustee of the estate of the deceased.*
4. *The learned Judge erred in holding that there was a valid contract between the Plaintiff and the Defendant for the sale and purchase of the property.*
5. *The learned Judge erred in law in holding that the Respondent was entitled to specific performance of the same contract when there was a Caveat on the Title which had been extended by an Order of another High Court Judge.*
6. *Such further and/ or other grounds that may be gathered from the records when the same is available.”*

[4] The Respondent filed an affidavit in reply sworn on 7<sup>th</sup> May 2015 praying that the application of the Appellant be dismissed with costs.

- [5] The Respondent had entered into a sale and purchase agreement with the Appellant and her daughter, Raj Mati to purchase a land, described as Lots 1 and 3 of DP 1312 containing an area of 12 acres 3 roods 35 Perches for a sum of \$435,000.
- [6] The Appellant and her daughter Raj Mati (as executrices and trustees of the estate of Ram Prasad) were the registered proprietors of the said land in certificate of title No.6739.
- [7] A sum of \$43,500 was paid as a deposit towards the purchase price of the said property to the Appellant on the execution of the said agreement.
- [8] As the Appellant and her daughter had failed to transfer the property to the Respondent despite the Respondent substantially performing his contractual obligations under the said agreement, the Respondent filed a statement of claim on 25<sup>th</sup> June 2007 seeking specific performance of the sale and purchase agreement.
- [9] The Appellant alleged that the said sale and purchase agreement was invalid and unenforceable on account of fraud, misrepresentation of facts and undue advantage by the Appellant's daughter.
- [10] The High Court by its decision dated 22<sup>nd</sup> April 2014 granted an order for specific performance of the sale and purchase agreement and costs in a sum of \$3,000.
- [11] The Appellant had failed to appeal the said judgment of the High Court within the stipulated time and is now seeking extension of time to appeal the said judgment of the High Court.



- [12] In **Datt v. Datt** [2013] FJCA 58; Civil Misc Action 33.2011 ( June 2013) Calanchini AP (as he was then) set out the issues that the Court would be considering in an application for extension of time file a notice of appeal as follows:

*“[5] In an application of this kind, the Court is generally concerned with four issues. They are (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the proposed appeal succeeding and (4) prejudice to the Respondent. See: **Bahadur Ali and Ors v Ilaitia Boila and Chirk Yam and Ors**. (ABU0030 of 2002; 5 September 2002.) The Court may consider whether the appeal raises (1) issues of general importance (**Native Land Trust Board v Lesavua and Subramani** – unreported Misc. action No.1 of 23004; 18 March 2004), (2) important questions of law (**Beci and Others v Kaukimoce and Others** – unreported Misc. action No. 2 of 2009; 20 January 2010) and (3) issues that in the interest of justice should be considered by the Full Court (**Narayan v Narayan** unreported Misc. Action No.14 of 2009; 3 September 2010).”*

- [13] In the present application, the judgment was delivered on the 22<sup>nd</sup> of April 2014 and the application seeking extension of time was filed on the 9<sup>th</sup> of December 2014, the length of the delay is about five months taking into account that the appealable period is 42 days.
- [14] The Appellants sets out the reasons for the delay in her affidavit. She states that she was represented by Mr. Suresh Maharaja and that unknown to her Mr. Maharaj had passed away and she had no advise on the status of her case. She had no notice of the judgment and She had come to know of the judgment about 4 months after the judgment had been delivered when her son had come to Fiji. Thereafter she had instructed Mr. Singh to take up the matter. She believed that Mr. Singh had tried to locate her files from the Legal Practitioners Unit and had been able to locate only the Communications folder. She believed that the pleadings folder had been misplaced and not with the Legal Practitioners Unit.

[15] She stated further in her affidavit that she was 83 years old and not educated. Her Daughter the second named defendant had fraudulently induced her to sign off on the sale and purchase agreement and other documents for the sale of the property. That she never wanted to sell the property. That one of her sons, Sarab Jeet had placed a Caveat on the land which had been extended by an order of the High Court.

[16] It is necessary for a litigant to keep a tab on a case where he/she is a party specially when the trial has been concluded and the judgment is pending. The circumstances in the present case, where the Appellant who was not resident in Fiji, being old and uneducated may go to some extent to excuse the delay specially when her Lawyer had died which fact was not known to her and what such a person is expected to know about the legal processes that take place after the death of a lawyer.

[17] However, the excusable delay alone does not guarantee the success of an application for extension of time. In **Tevita Fa v Tradewind Marine Ltd and Another** ABU 40 of 1994 (18 November 1994) Thompson JA stated:

*“As important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds.”*

[18] The Applicant has to establish that the grounds of appeal raise more than just a reasonable chance of success for leave to be granted.


[19] Grounds 1 to 4 of the grounds of appeal in the intended appeal relate to the validity of the sale and purchase agreement that was entered into.



- [20] The said grounds of appeal 1 to 4 are based on questions of fact. The learned trial Judge had in his judgment analysed the evidence placed by both parties and arrived at his conclusion that the agreement was valid.
- [21] The learned trial Judge had considered the evidence relating to the position taken up by the Appellant that the facts were misrepresented to her when she signed the relevant documents and accepted the evidence to the effect that the documents were explained to her by the Solicitor who executed the documents in the language that the Appellant had understood before she signed the documents.
- [22] Decisions on questions of fact are based on credibility, manner or demeanour of witnesses and it is the trial Judge who is in the best position to decide on facts on that basis. Such a finding will rarely be disturbed by an Appellate Court except where the trial Judge is shown to have erred in principle. In the grounds of appeal relied on by the Appellant no such errors have been shown.
- [23] The Appellant is also relying on ground 5 which refers to a caveat that has been filed in respect of the land and which has been extended by another High Court. This was not a matter that had been brought to the notice of the Court for the trial Judge to consider it. It is a matter which the Respondent may have to encounter in the future. But as far as the relief that the Respondent sought is concerned, the sale agreement has been held to be valid and specific performance has been ordered.
- [24] In the above circumstances, it is highly unlikely that the appeal of the Appellant would be successful. There are no special circumstances shown by the Appellant which would involve the exercise of discretion of this Court in granting extension of time in her favour.

- [25] The other issue that remains to be considered is as regards the prejudice that would be caused to the Respondent.
- [26] The Respondent has got a judgment in his favour and would be looking forward to reap the fruits of the judgment. The action was instituted in 2007 after paying the deposit in 2004 which has been held in the solicitor's account, and almost ten years have lapsed since then and at least two years have lapsed since the judgment. In this situation, the Respondent will be prejudicially affected if extension of time is granted.
- [27] The Appellant had also sought a stay pending the application for extension of time to file an appeal. The Appellant has failed to show any special circumstances which would justify the grant of a stay.
- [28] For the reasons set out above, the application for extension of time to file a notice of appeal and the application for stay is refused.
- [29] The parties shall bear their own costs.



  
Hon. Justice S. Chandra  
**RESIDENT JUSTICE OF APPEAL**