

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

**CIVIL APPEAL NO. ABU 99 OF 2016**  
**(Magistrates Court Civil Action No. 92 of 2012)**

**BETWEEN** : **UMESH NARAYAN & NANISE NARAYAN**

*Appellants*

**AND** : **MOHAMMED SHIKANDER BUKSH**

*Respondent*

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

**Counsel** : **Appellants in person**  
**Mr. G. O'Driscoll for the Respondent**

**Date of Hearing** : **17 March 2017**

**Date of Ruling** : **1 August 2017**

**RULING**

- [1] The Respondent commenced proceedings in the Magistrate's Court at Nausori claiming a sum of \$39,000.00 from the Appellants.
- [2] The basis of the claim was that the Respondent had entered into a sale agreement for the purchase of land from the Appellants for a sum of \$160,000, that he had paid \$39,000 as part consideration of the purchase price and that the sale did not proceed. The Respondent had sent a demand letter to the Appellants but they had not paid back the \$39,000.

- [3] The Defendants in their statement of defence had taken up the objection that the action was out of time as being barred by section 4-1 of the Limitation Act. In their reply to the affidavit in support they had mentioned that the Respondent had failed to mention about the dishonor of his cheque for \$12,000.
- [4] At the hearing the Appellants raised the issue of the action being time barred and this was determined as a preliminary issue.
- [5] The learned Magistrate had held that the action was not time barred and as the Appellants had not taken up any other defence, that the Respondent was entitled to judgment as claimed with costs in a sum of \$2000.
- [6] The Appellants appealed against the said judgment to the High Court on the following grounds:
1. *That the learned Resident Magistrate erred in law when he proceeded to hear an application made orally by the Plaintiff/Respondent on the issue of limitation without a proper Notice of Motion being filed.*
  2. *That the learned Resident Magistrate erred in law and in fact by making a decision against the Defendant/Appellant without allowing the Defendant/Appellant time to amend his pleading after deciding that limitation period does not apply to this case.*
  3. *That the learned Resident Magistrate erred in fact and in law in holding that the proceedings were filed within the limitation period when the Sale and Purchase Agreement had expired on 30 March 2004.*
  4. *That the learned Resident Magistrate erred in law and in fact in not proceeding to the hearing of the matter on 25 March 2014 and granted the Plaintiff/Respondent to file Affidavit in support without support of an motion and deciding the matter on Affidavits and Submissions alone.*
  5. *That the Defendant/Appellant reserve their rights to argue and/or add and/or amend the grounds of appeal."*
- [7] The High Court dismissed the appeal by judgment dated 9 August 2016 held that the lower court was correct in proceeding to hear the issue of limitation as a preliminary

issue and that the ground of appeal failed. The High Court further held that grounds 1,2,4 and 5 also failed.

[8] The Appellants by summons filed on 28<sup>th</sup> September 2016 with a supporting affidavit dated the 27<sup>th</sup> September 2016 sought leave to appeal out of time from the judgment of the High Court setting out the following grounds of appeal:

1. *That the learned Judge erred in law in not applying the provisions in the Limitation Act.*
2. *That the sale and purchase agreement was lapsed (as attached).*
3. *That there was Receiving Order against the Respondent.*
4. *That the cheque issued by Respondent as part payment on deposit on purchase price was dishonoured."*

[9] Section 12(1)(c) of the Court of Appeal Act confers a right of appeal to this Court from a decision of the High Court in the exercise of its appellate jurisdiction on grounds which involve a question of law only. Such an appeal should be filed within 42 days.

[10] The Appellants filed an application seeking leave to appeal out of time on 28 September 2016 which is 49 days from the date of the judgment of the High Court.

[11] In an application seeking leave to appeal out of time, it is well established (**Kumar v State; Sinu v State** [2012] FJSC 17; CAV0001.2009 (21August 2012)) that the following criteria have to be considered:

- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) Whether there is a ground of merit justifying the Appellate Court's consideration;

- (d) Where there has been a substantial delay, nonetheless is there a ground of appeal that will probably succeed ; and
- (e) If time is enlarged, will the Respondent be unfairly prejudiced.

**The length of the delay and reasons for the delay**

- [12] Although the Appellants have filed an application seeking to appeal out of time as they had passed the appealable period they have not given any reasons for the delay of 7 days.

**Whether there is a ground of merit justifying the Appellate Court's consideration**

- [13] On a perusal of the judgment of the Magistrate's Court, it is clear that what had been required at the hearing was a ruling as regards the preliminary issue that was raised by the Appellants regarding the time bar. In fact the learned Magistrate gave a written Ruling on 11 June 2014 answering the preliminary issue in favour of the Respondent. The cause of action according to the Respondent had arisen in 2007 when the Appellants had sold the property to a third party and the said transfer had been registered on 26 June 2007.

- [14] The learned Magistrate having dealt with the preliminary issue in favour of the Respondent went on to make the following orders:

- “1. *The Limitation Act does not bar the Plaintiffs from pursuing this matter. It is within time.*
2. *Since there is no other defence and having found out (1) above, I find that the plaintiff is entitled to judgment as claimed.*
3. *The plaintiff is also granted costs of \$2000.00 that has been summarily assessed.*
4. *The Plaintiffs are entitled to costs of this action.*
5. *7 days to appeal.”*

- [15] The Appellants appeal to the High Court was dismissed on the basis that the learned Magistrate was correct when he decided that the action was not barred by the Limitation Act. However, the High Court failed to consider the effect of the Ruling which concluded the entirety of the matter, as judgment was entered in favour of the Respondent.
- [16] As the claim of the Respondent had not been established by way of any evidence, there is merit in the appeal as the Respondent had not established his claim specially when the Appellants had in their statement of defence denied the claim of the Respondent and had stated that even a cheque given by the Respondent for \$12,000 had been dishonoured.
- [17] The High Court had failed to consider the fact that the Ruling on the preliminary issue had the effect of a final judgment and had thereby erred in dismissing the appeal of the Appellants.

**Is there a likelihood that the appeal will probably succeed?**

- [18] In view of the fact that the High Court had erred in dismissing the appeal by not considering the fact that the Ruling of the learned Magistrate had in the process of determining the preliminary issue disposed off the entirety of the case, there is a likelihood that the appeal will probably succeed in spite of there being a delay in filing the appeal.

**If time is enlarged will the Respondent be unduly prejudiced**

- [19] The Respondent has got a judgment in his favour without proving his claim. He would appear to be prejudiced as he would have been waiting to reap the fruits of the judgment in his favor but the prejudice caused to the Appellants outweigh the Respondent's prejudice as the Appellants have not had an opportunity to challenge the claim of the Respondent.

[20] In view of the above, leave to appeal out of time is granted to the Appellants.

**Orders of Court:**

- (1) *Leave to appeal out of time is granted to the Appellants;*
- (2) *The Appellants shall file and serve a notice of appeal setting out the grounds of appeal on the Respondent within 21 days of this Ruling;*
- (3) *The parties shall bear their own costs.*





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