IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 026 of 2023
[In the High Court at Suva Case No. HBC 70 of 2016]

BETWEEN	:	**TONY TESSITORE**
		Appellant
AND	:	**RUGGIERO INVESTMENT LIMITED**
		1st Respondent
		ITAUKEI LAND TRUST BOARD
		2nd Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. M. Yunus for the Appellant** **Mr. T. Tuitoga for the 01st Respondent** **Mr. J. Cati for the 02nd Respondent (nominal)**
Date of Hearing	:	**04 October 2024**
Date of Ruling	:	**07 October 2024**

RULING

[1] The appellant is seeking enlargement of time to appeal the judgment of the High Court at Lautoka delivered on 26 January 2023 whereby *inter alia* it ordered the appellant to pay the 01st respondent a sum of $48,961.74 with interest and cost of $3000.00

[2] The appellant's action was based on the sub-leasing agreement with the respondent whereby the latter had agreed to sublease possession of the lease to the appellant at $6000.00 per month for 05 years with another $18,000.00 to be deposited as security by the former.

[3] The appellant should have filed his appeal within 42 days of the judgment[1] whereas he filed it 01 month and 05 days (36 days) after the appealable period. Hence, his application for enlargement of time supported by an affidavit explaining the reasons for the delay. His proposed grounds of appeal are:

> '***Ground 1***
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> ***THAT*** *the learned trial judge erred in law and in fact to order the appellant to pay sum of $48,961.74 to the respondent as rental dues despite finding that the agreement entered between the appellant and respondent was void ab initio and not enforceable.*
>
> ***Ground 2***
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> ***THAT*** *the learned trial judge's judgment is not supported by the evidence adduced in the trial and therefore is unreasonable or repugnant to justice as such in the interest of justice it must to wholly set aside and revoked.*

Law on enlargement of time

[4] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time[2]. However, the appellate courts always consider five non-exhaustive factors to ensure a principled approach to the exercise of the judicial discretion in an application for enlargement of time namely (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? and (v) if time is enlarged, will the respondent be unfairly prejudiced?[3] Nevertheless, these matters should be considered in the context of whether it would be just in all the circumstances to grant or refuse the application and the onus is on the appellant to show that in all the

[1] Rule 16 of the Court of Appeal Act.

[2] **State v Minister forTourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

[3] **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013); **Fiji Revenue and Customs Services v New India Assurance Co. Ltd.** [2019] FJSC 34; CBV0020.2018 (15 November 2019); **Norwich and Peterborough Building Society v Steed** (1991) 2 ALL ER 880 C.A; **CM Van Stilleveldto B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

circumstances it would be just to grant the application[4]. In order to determine the justice of any particular case the court should have regard to the whole history of the matter, including the conduct of the parties[5]. In deciding whether justice demands that leave should be given, care must also be taken to ensure that the rights and interests of the respondent are considered equally with those of the applicant[6].

[5] Since the reason for the delay is an important factor to be taken into account, it is essential that the reason is properly explained - preferably on affidavit - so that the court is not having to speculate about why the time limit was not complied with. And when the court is considering the reason for the delay, the court should take into account whether the failure to observe the time limit was deliberate or not. It will be more difficult to justify the former, and the court may be readier to extend time if it was always intended to comply with the time limit but the non-compliance arose as a result of a mistake of some kind.[7]

[6] The length of the delay is determined by calculating the length of time between the last day on which the appellant was required to have filed and served its application for leave to appeal and the date on which it filed and served the application for the enlargement of time.[8] In this case the last appealable date was 08 March 2023 and the enlargement of time application was filed on 12 April 2023 and therefore length of the delay is 01 month and 05 days which is substantial. 40 days have been considered 'a significant period of delay'[9]. Delay of 11 days[10] and 47 days[11] also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation[12]. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the

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[4] **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)
[5] **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86
[6] Per Marsack, J.A. in **Latchmi v Moti** (supra)
[7] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)
[8] **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)
[9] **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)
[10] **Avery v Public Service Appeal Board** (supra)
[11] **Latchmi v Moti** (supra)
[12] **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.[13]

[7] As for the reason for the delay the appellant claims in his affidavit that soon after the judgment he instructed his solicitor to appeal and the latter assured him that he would do so within the appealable time of 42 days and asked him to visit his office. He had followed up with his solicitor who assured that the latter was working on the appeal papers and once ready they would be filed. Having not received a call the appellant had visited his solicitor's office and was told to pay $3000.00 for him to file the appeal. He managed to collect only $1500.00 and again visited the solicitor's office to be told that he did not have to pay him but was asked to pay it to court but not specified the court. Then, he consulted the current solicitor apparently on 06 April 2023 and upon his advice the appellant on 11 April 2023 had checked with the registries of the Court of Appeal (over the phone) and Lautoka High Court (by personal attendance) only to find that no appeal had been lodged.

[8] The respondent submits that the appellant has not disclosed when he consulted the current solicitor. However, from his affidavit it could be reasonably assumed that it was 06 April 2023 *i.e.* nearly a month after the last day for appealing. Then, as argued by the respondent the appellant has not explained why he waited for almost a month to meet his current solicitor. In addition, the respondent submits that the appellant has not disclosed when he was told by his former solicitor to pay $3000.00 and when he took $1500.00 to his office. The counsel for the appellant's response was that his client could not recollect those dates. Moreover, there is not even a letter from his former solicitor to substantiate the appellant's explanation for the delay[14].

[13] **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)

[14] See for similar remarks **Vatutaqiri v State** [2024] FJCA 106; AAU061 of 2022 (04 June 2024).

[9] Lord Greene, M.R., at p. 919, stated in **Gatti v Shoosmith** [1939] 3 All ER 916 on the failure to lodge a timely appeal due to a mistake by a solicitor as follows.

> *'the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts…… What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that argument.'*

[10] There is no rule that just because the litigant has not been at fault, he can escape the consequences of a mistake on the part of his lawyers. Nor is there any rule that because lawyers are expected not to make the sort of mistake which results in a notice of appeal not being filed in time, the litigant can never escape the consequences of such a mistake. It depends on the facts of each case.[15]

[11] However, the appellant's reason for the delay is the alleged inaction or fault on the part of his former solicitor and not a mistake. Litigants should not assume that leave will be given to bring or maintain appeals or other applications where those appeals or applications are out of time unless there are clear and cogent reasons for doing so. A contention as to incompetence of legal advisers will rarely be sufficient and, where it is, evidence 'in the nature of flagrant or serious incompetence' [**R v Birks** (1990) NSWLR 677] is required and 'merit' of the appeal or proceeding, without more, would not justify an extension of time except where the delay was minimal and no prejudice was occasioned by a respondent[16]. A "contention as to incompetence of legal advisers will rarely be sufficient", means that such a contention would rarely be sufficient *on its own*. In other words, there was no basis for saying that mistakes on the part of the lawyers should be an automatic gateway to permitting the appeal to proceed. There would have to be other factors in favour of allowing that to happen, such as only minimal delay, the

[15] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** (supra)
[16] **Vunimoli Sawmill Ltd v Amrit Sen** [2013] FJCA 140; ABU28.2013 (20 December 2013) &
Vimal Construction and Joinery Works Ltd v Bimal Prakash [2008] FJCA 98; ABU0093.2006S (15 April 2008)

absence of serious prejudice to the other party and a reasonable chance of success in the appeal itself. By the same token, a good chance of success in the appeal would not normally be enough; the delay would have to be minimal, and the other party would not have to be prejudiced by that delay.[17]

[12] Even where the length and the reasons for the delay are adequately explained to the satisfaction of Court, if an appellant is unable to satisfy Court as to his or her chances of success in appeal if extension is to be granted, then the application must be rejected; even if an appellant fails to satisfy court as to the length and reasons for the delay, nevertheless a Court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted unless the reason for the delay in either case is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers[18]. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said[19] that the effect of propositions (i) and (ii) subject to proposition (iii) is to make the merits of the appeal the paramount, indeed the decisive, consideration and that goes too far because there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused. The Supreme Court added that the bottom line is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their

[17] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** (supra)

[18] Per Dr. Almeida Guneratne, J.A. in **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192; Misc. Action 03.2012 (5 December 2014) & **Gregory Clark v Zip Fiji** [2014] FJCA 189; ABU0003.2014 (5 December 2014)

[19] **Fiji Industries Ltd v National Union of Factory and Commercial Workers** (supra)

appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected. As for the proposition (iii), the Supreme Court said mistakes made by lawyers is not an exceptional category for this purpose and the fact that the mistake was made by lawyers is just one matter to be taken into account in the whole scheme of things, but it can in no way be decisive.

[13] However, Dr. Almeida Guneratne, P took a different view later and said[20] that If the length and reasons for the delay, (criteria (a) and (b) laid down in ***Khan's case***) are explained to the satisfaction of Court, then the matter should be left to the full Court to determine the appeal on the merits because, while a party who files an appeal within time is vested with an unqualified statutory right, party who seeks enlargement of time to appeal requires the exercise of the court's discretion to earn that right. That right is earned when the aforesaid criteria (a) and (b) are satisfied. If the threshold criteria as envisaged in (a) and (b) above are not met by an applicant for enlargement of time to appeal, then such an application should be rejected and/or dismissed without the need to consider criteria (c) and (d) laid down in **Khan's case** in as much as the above reasons would not be applicable. A distinction must be drawn between a party who explains the delay to the satisfaction of Court to be treated on a par with a timely appeal and a party who fails to explain the reasons for the failure to file a timely appeal.

[14] However, because Dr. Almeida Guneratne, P has not taken into account the views of the full court judgment of the Supreme Court in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** in his second ruling in ***Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary*** and also because I am bound by the Supreme Court decision, I am inclined to follow the Supreme Court decision in accordance with section 98(6) of the Constitution of Fiji incorporating the doctrine of *stare decisis*.

[20] **Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary** [2022] FJCA 190; ABU0020.2022 (30 December 2022)

[15] The totality of the appellant's explanation for the delay viewed in the context the respondent's challenge to its credibility, I am of the view that it does not meet the necessary threshold to satisfy the requirement for reasons for the delay satisfactorily.

[16] However, I am still required to consider the prospect of his appeal before the Full Court, for interest of justice demands that I take a holistic approach[21] by considering all the factors set out in ***Native Land Trust Board v Khan*** (supra) in addition to any other relevant factors before exercising my discretion either to grant enlargement of time or not.

[17] The appellant argues not without merit that the learned trial judge could not have ordered the payment of $48,961.74 as arrears of rent after deducting the security deposit (i.e. $66,961.74 - $18,000.00) when he admittedly and correctly declared the sub-lease agreement null and void *ab initio* because no consent from iTaukei Land Trust Board (ILTB) had been taken as mandatorily required by section 12(1) of the ILTB Act. The fact that there was an arrears of rent amounting to $66,961.74 was an unchallenged fact at the trial. So was the fact that the consent of ILTB had not been taken. The respondent's argument in response was that there was a counter claim based on rental arrears (which is borne out by the impugned judgment) and therefore, although the trial judge could not have ordered arrears of rent as owing to the respondent based on the agreement after declaring it invalid, he could still do so as per the counter claim. The appellant responded by stating that the trial judge had not stated at paragraph 12 of the judgment that he was ordering rental arrears based on anything other than the agreement. However, it is clear from paragraph 12 that the trial judge was dealing with the respondent's counter claims. However, the question is whether even as part of the counter claim, the trial judge could have ordered 'arrears of rent' when he had declared the agreement under which rent was specified unenforceable. The respondent admits that it had not pleaded the arrears of rent in equity although the same amount had been claimed as mesne profit as one of the

[21] **Hussein v Prasad** [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

counter claims. Even if the respondent had done so, the appellant has submitted that the respondent would not have succeeded in the light of the decision in **Chalmers v Pardoe** [1963] 1 W. L. R. 677 which was an appeal from Fiji Court of Appeal where Privy Council *inter alia* said:

> *' .... that a dealing in the land took place here without the prior consent of the Board as required by section 12 of the ordinance: that the dealing was accordingly unlawful: and that in these circumstances equity cannot lend its aid to Mr. Chalmers.'*

[18] Thus, just as Keith J said in ***Fiji Industries Ltd v National Union of Factory and Commercial Workers*** there may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard and I think this is one such case. I cannot say that this appeal has little or no chance of success.

[19] The respondent has not averred in its affidavit any specific or substantial prejudice that would be caused by the enlargement of time except to say that the respondent is entitled to the fruits of its judgment. The appellant had been evicted from the property on 28 October 2016.

[20] In all the circumstances above discussed, taking an all-inclusive view of the relevant law and the material before me, I am inclined to grant the appellant enlargement of time to appeal. However, given that the length of the delay is long and the reasons for it are not all that convincing I would cast the appellant in cost.

Orders of court:

(1) Enlargement of time to appeal is granted on the two grounds of appeal set out in this Ruling.

(2) Appellant to file and serve Notice of Appeal on the respondent within 21 days from the date of this Ruling.

(3) Thereafter, appeal to proceed under Rules 17 and 18.

(4) Appellant to pay cost of $2000.00 to the respondent within 21 days of this Ruling.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

M Y Law for the Appellant
Haniff Tuitoga Lawyers for the 1st Respondent
ITLTB Lawyers for the 2nd Respondent