

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

**CIVIL APPEAL NO. ABU 65 of 2022**  
**[In the High Court Case No HPP 85 of 2020]**

**BETWEEN** : **AKUILA DAVID ANTONIO**  
**QITOKEMAORIMAILAUTOKA TAVUTO** aka **AKUILA**  
**TAVUTO**  
*Appellant*

**AND** : **ANASEINI MARETA TAVUTO**  
*01<sup>st</sup> Respondent*

: **SELINA TOVAKI TAVUTO**  
*02<sup>nd</sup> Respondent*

**Coram** : **Prematilaka, RJA**

**Counsel** : **Ms. S. Nayacalevu for the Appellant**  
**Mr. J. Dinati for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

**Date of Hearing** : **24 January 2025**

**Date of Ruling** : **30 January 2025**

**RULING**

[1] The appellant’s solicitors had lodged summons on 12 October 2022 to extend time to appeal the Decision of the High Court delivered on 08 February 2022, supported by an affidavit from Sevanaia Tabuakara who described himself as a member of the support staff in the employment of Shekinah Law, the appellant’s solicitors. It is common ground that his solicitors had filed a timely Notice and Grounds of Appeal on 28 February 2022 but not served the same on the respondent. Thus, the appellant had failed to comply with Rule 15(4) of CA Rules and his appeal was deemed abandoned in terms of Rule 17(2). No fresh notice of appeal had been tendered within 42 days from the abandonment either. Hence, the present

application seeking leave of this court to file the appeal out of time. Thus, the delay is 05 months and 17 days.

- [2] The respondent had not filed an affidavit in opposition to the extension of time application but had filed summons on 19 November 2022 seeking to have the appellant's summons struck off/dismissed for failure to comply with Rules.

***Should the appellant's application for extension of time to appeal in terms of Rule 17(3) of CA Rules be allowed?***

*Law on enlargement of time*

- [3] It is well settled now that this Court has an unfettered discretion in deciding whether or not to grant the leave out of time<sup>1</sup>. 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?<sup>2</sup> 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 circumstances it would be just to grant the application<sup>3</sup>. 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<sup>4</sup>. 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<sup>5</sup>.

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<sup>1</sup> **State v Minister for Tourism and Transport** [2001] FJCA 39; ABU0032D.2001 (12 November 2001); **Latchmi v Moti** [1964] FijiLawRp. 8; [1964] 10 FLR 138 (7 August 1964)

<sup>2</sup> **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 Stilleveldt B V v. E L Carriene Inc.** [1983] 1 ALL ER 699 of 704.

<sup>3</sup> **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47; ABU7.2014 (20 March 2015)

<sup>4</sup> **Avery v Public Service Appeal Board** (No 2) (1973) 2 NZLR 86

<sup>5</sup> Per Marsack, J.A. in **Latchmi v Moti** (supra)

- [4] 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.<sup>6</sup>
- [5] 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.<sup>7</sup> In this case the renewed application for leave to appeal should have been filed by 26 February 2024 but eventually filed on 26 March 2024. Thus, the length of the delay is 04 weeks which is substantial. 40 days have been considered 'a significant period of delay'<sup>8</sup>. Delay of 11 days<sup>9</sup> and 47 days<sup>10</sup> also have defeated applications for enlargement of time. Even 04 days delay requires a satisfactory explanation<sup>11</sup>. However, in some other instances, delay of 05 months and 02 years respectively had not prevented the enlargement of time although delay was long and reasons were unsatisfactory but there were merits in the appeal.<sup>12</sup>
- [6] Rules of court must, prima facie, be obeyed and in order to justify a court in extending the time during which some step in procedure is required to be taken there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.<sup>13</sup>

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<sup>6</sup> **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

<sup>7</sup> **Habib Bank Ltd v Ali's Civil Engineering Ltd** (supra)

<sup>8</sup> **Sharma v Singh** [2004] FJCA 52; ABU0027.2003S (11 November 2004)

<sup>9</sup> **Avery v Public Service Appeal Board** (supra)

<sup>10</sup> **Latchmi v Moti** (supra)

<sup>11</sup> **Tavita Fa v Tradewinds Marine Ltd and another** ABU 0040 of 1994 (18 November 1994) unreported

<sup>12</sup> **Formscaff (Fiji) Ltd v Naidu** [2019] FJCA 137; ABU0017.2017 (27 June 2019) & **Reddy v. Devi** [2016] FJCA 17; ABU0026.2013 (26 February 2016)

<sup>13</sup> **Ratnam v Cumarasamy** [1964] 3 All E.R. 933

[7] As for the reason for the delay the appellant claims in his affidavit dated 21 June 2024 that the reason for the delay was the delay caused by the ERT in delivering its original decision (02 years and 08 months) and then ERC delaying its judgment (03 years and 04 months). However he has not explained the delay of almost 01 year and 06 months in trying to invoke the jurisdiction of this court since 15 November 2022 or 20 days since 03 May 2024. Therefore, I am not persuaded by the explanation or the reasons for the delay. I am also of the view that the explanation does not meet the necessary threshold to satisfy the requirement for reasons for the delay.

[8] 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<sup>14</sup>. The Supreme Court commenting on these three position of Dr. Almeida Guneratne, J.A. said<sup>15</sup> 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

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<sup>14</sup> 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)

<sup>15</sup> **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017)

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 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.

[9] However, Dr. Almeida Guneratne, P took a different view later and said<sup>16</sup> 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.

[10] 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,

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<sup>16</sup> *Pacific Energy (South-West Pacific) Pte Ltd v Chaudhary* [2022] FJCA 190; ABU0020.2022 (30 December 2022)

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*.

[11] 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<sup>17</sup> 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.

[12] The length of the delay is admittedly 05 months and 17 days which is substantial. The reason adduced by the appellant for the delay is that the appellant was unable to locate the 01<sup>st</sup> and 02<sup>nd</sup> respondents to serve on them, as required, the summons containing notice of appeal which, however, had been filed on the CA registry within the first 42 days from 09 February to 22 March 2022. However, the appellant managed to serve summons including notice of appeal on the 02<sup>nd</sup> respondents on 30 April 2022. By that time the initial notice of appeal was deemed abandoned. The 01<sup>st</sup> respondent, however, could not be located within the next 42 days from 23 March to 05 May 2022. The appellant managed to get credible information of the 01<sup>st</sup> respondent's whereabouts by 01 September 2022. However, by then the second 42 days also had lapsed. Thus, in the end both the first and second 42 days' timelines had lapsed. Hence, the current application for extension of time to appeal.

[13] In the absence of any opposition to these averments, I have no reason to doubt the credibility of the reasons adduced by the appellant for the delay. Therefore, I am inclined to accept those reasons as reasonable and that the delay was beyond the control of the appellant.

[14] As for the merits of the appeal, the appellant under the 04 grounds of appeal submits that (i) the High Court judge had not considered his affidavit filed on his behalf on 08 October 2021 by Sevanaia Tabuakara. (ii) the respondents had used the same advertisement

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<sup>17</sup> Hussein v Prasad [2022] FJSC 7; CBV 15 of 2020 (3 March 2022)

published in the Fiji Sun on 16 July 2019 by the appellant to commence proceedings for letters of administration of his mother's estate, (iii) the appellant had been solely managing the estate spending his personal funds from UK when the respondents, though residing in Fiji, did not have the means to administer the estate of their mother and had earlier consented to the appellant to file for letters of administration, (iv) the respondent's application 66572 for letters of administration was not placed before court.

[15] The High Court judge in his determination of the rival claims by the appellant and the respondents for letters of administration of their mother's estate had concluded *inter alia* that it was always appropriate that the administrator/administratrix is appointed in the deceased's estate who reside within jurisdiction.

[16] The respondents have argued in their submissions before this court that the summons submitted by the appellant does not conform to the mandatory template and requirements of Form 5 for originating summons – Ex parte (O.7m r.2). I do not think that the Court of Appeal Rules have laid down any specific Form to be used to seek leave of the court to file an appeal out of time in terms of Rule 17(3).

[17] The respondents have also argued that the affidavit filed by the appellant on his behalf sworn to by Sevanaia Tabuakara was without any authority and should be struck off for being defective, erroneous and misconceived. They rely on the single judge decision by the then Chief Justice in **Paul v Director of Lands** [2020] FJSC 3; CBV0018.2019 (9 June 2020) where His Lordship held

*'[16] When Third Party (including Law Clerks/Legal Executives/Litigation Clerks) depose Affidavit on behalf of a party to the proceedings then he/she:-*

*(i) must be authorised in writing by that party to depose such Affidavits;*  
*(ii) must depose as to why that party and if a Company than why its director or authorized officer cannot depose the Affidavit;*  
***(iii) must not depose Affidavits on basis of information or belief but depose facts the deponent has knowledge of those facts except where:***

- (a) Affidavit is in support of or in opposition to Application for Summary Judgment;*
- (b) Affidavit verifying facts in respect to action for specific performance pursuant to Order 86 of HCR only if directed by Court to do so;*

• (c) Affidavit verifying evidence of facts during trial when directed by Court to do so pursuant to Order 38 Rule 3 of HCR.

(iv) may depose Affidavits in support of or in opposition to interlocutory application but must do so on the basis of information received which they believe to be true and must disclose the source of such information or beliefs in addition facts that is within their personal knowledge.

[18] In the matter before me, Sevanaia Tabuakara had been described as a member of the support staff of the appellant's solicitors. The solicitors had been authorized by the appellant to depose on behalf of the appellant an affidavit in support of summons to extend time to appeal. The respondents' argument is that that authorization does not extend to Sevanaia Tabuakara who is a third party.

[19] The appellant on the other hand argues that *Paul* is a single judge decision and the subsequent Court of Appeal decision in **R B Patel Group Ltd v Central Board of Health** [2023] FJCA 246; ABU032.2022 (30 November 2023) by three judges should prevail over Paul where it was *inter alia* held that

*59. All affidavits filed into Court, need only to comply with Order 41 and under it, there is no requirement for any affidavits, excluding those exceptions under Order 4 Rule 5 (1), to be authenticated or deposed with a written authority in case of a company annexed to it.*

[20] **R B Patel** was concerned with an affidavit sworn to by the CEO of the company on behalf of the company but there was no specific authorization attached to the affidavit.

[21] It is clear that in **R B Patel** the Full Court of the Court of Appeal had considered *Paul*. However, **R B Patel** dealt with a slightly different situation to that has arisen in the matter before me in that in this matter the appellant is a natural person as opposed to R B Patel Group Ltd which is a legal person and the deponent here is a member of the support staff as opposed to the CEO who had personal knowledge as to the facts of the company.



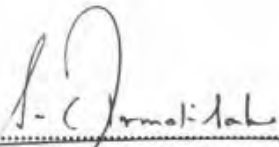
- [22] In the circumstances, there is an important question of law to be clarified by the Full Court for the benefit of practitioners and litigants i.e. whether an affidavit sworn to by a member of the support staff of a law firm on behalf of a client could be valid and accepted in judicial proceedings.
- [23] As for merits of the appellant's appeal, just as Keith J in the Supreme Court 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.
- [24] In my view, this appeal also raises an important question of law as stated earlier, and therefore I think the overall interests of justice demands that the appellant be given extension of time to file notice of appeal.
- [25] When it comes the prejudice to the respondents, they have not averred any irreparable or irrevocable prejudice that will be caused as a result of allowing leave to file the appeal out of time.
- [26] 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 file a notice of appeal but no cost would be ordered against the respondents.

**Orders of court:**

- (1) *Leave to file a Notice of Appeal against the impugned High Court judgment dated 08 February 2022 is allowed.*
- (2) *Appellant to file and serve Notice of Appeal on the respondents within 21 days from the date of Ruling.*
- (3) *Thereafter, appeal to proceed under Rules 17 and 18.*

(4) *Cost lie where they fall.*



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