

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**CIVIL ACTION NO: HBC No. 219 of 2013**

**BETWEEN** : Gopal Pillay  
**Plaintiff**

**AND** : Tori Grey & Family & Others  
**First Defendant**

**AND** : Manueli & Family & Others  
**Second Defendant**

**AND** : Vilipe Nagone & Family & Others  
**Third Defendant**

**AND** : Inoke Vunidadawa & Family & Others  
**Fourth Defendant**

**AND** : Kaliyoba & Family & Others  
**Fifth Defendant**

**AND** : Viliame Salabogi & Family & Others  
**Sixth Defendant**

**AND** : Delai & Family & Others  
**Seventh Defendant**

**BEFORE** : The Hon. Mr Justice David Alfred

**Counsel** : Mr J Savou for the Plaintiff  
Mr N Nawaikula for all the Defendants

**Date of Hearing** : 14 September 2015  
**Date of Judgment** : 4 November 2015

## **INTERLOCUTORY JUDGMENT**

1. This is an application by Notice of Motion by the Plaintiff for enlargement of time to file a Notice of Appeal against the Order of the learned Master on 29 August 2014, refusing and dismissing the Plaintiff's Originating Summons for Summary Possession of Land.
2. The Plaintiff in his Affidavit in Support sworn on 11 February 2015, stated inter alia, he had been misled by his previous Counsel, that a person who had no legal ownership could not give the Defendants a right of occupation, and that he did not believe there would be an injustice to the Defendants if the Appeal were to be allowed.
3. The Affidavit in Opposition of the 3<sup>rd</sup> Defendant sworn on 3 August 2015 stated, inter alia, they had a substantive claim and prayed that the Plaintiff's Application be dismissed.
4. The Application came up for hearing before me on 14 September 2015 in the presence of Counsel. The Plaintiff had filed a Bundle of Authorities and a skeleton argument, while the Defendant had filed a written submission with authorities.
5. Counsel for the Plaintiff submitted that the Application before me was made under Order 59 rule 10 of the Rules of the High Court (RHC) because it had not been filed within 21 days as required by Order 59 rule 9(a).

6. The reason why the Plaintiff came to this court was because he had not filed nor applied for leave for extension of time before the Master. The reasons for his failure to do so were given in his Affidavit and were as follows:
  - (1) The reason for the 146 days delay was due to the fact that the Plaintiff's previous solicitors had not informed him of the Master's Order.
  - (2) The Master failed to consider the fact that the consent of the owner had not been established.
7. Counsel therefore submitted these were reasonable grounds for an extension of time as there are good grounds for the appeal to succeed.
8. Counsel for the Defendants agreed it was an application for extension of time and also agreed the authority of "Sunil Prasad" guides the Court whether to grant an extension of time. He submitted 146 days is a substantial delay and that the Court should not accept the Plaintiff's excuse and should leave him to his remedy against his own Counsel. He said there were no merit because the (Master) could refuse the summary process if he says there are triable issues. Counsel submitted there are triable issues and the Plaintiff should have filed a proper writ action which he still could do today.
9. The Plaintiff's Counsel in his reply said he agreed there was a substantive delay but asked the Court to look at the merits of the Application.
10. At the conclusion of the hearing, I reserved my judgment to a date to be announced. I now proceed to deliver my judgment.
11. In an application of this nature there are 2 factors to be considered viz:
  - (1) The reason for the substantial delay.
  - (2) Whether the ground/s of appeal is/are likely to succeed.
12. I take (1) first. The admitted substantial delay is according to the Plaintiff entirely due to his previous Counsel not informing him of the Master's Order and on the contrary misleading him that his action had been successful.

13. I see from the Plaintiff's Exhibit A that he had been informed by his previous Counsel's e-mail on 20 June, 2014 that the Master's Ruling would be given on 29 August 2014. On 28 October 2014 he received an e-mail from the said Counsel which said the court registry had yet to issue the sealed court order. Yet he waited until 5 February 2015 to e-mail his present Counsel to enquire as to the true situation. No reason has been provided for this more than three months' delay. I do not think this is a satisfactory explanation for the delay.
14. With regard to (2) I find that the Plaintiff is on more substantial ground. This is because the Affidavit in Opposition nowhere states the Defendants had the consent of any previous owner of the land to occupy the same. Instead the Defendants say they have a substantive claim based on occupation and cultivation of the land for the past 60 years. This is by no means to be equated to consent.
15. I have considered the following 2 authorities in arriving at my decision.
16. In the Court of Appeal, Fiji, Civil Appeal Misc. 4 of 2013 Between *Sunil Prasad Mishra...Appellant* And *Pra Contractors (Fiji) Company Limited...Respondent*, Calanchini P held that even in the absence of a reasonable or satisfactory explanation for a substantial delay of almost 3 months, it was still necessary to consider whether there is a ground of appeal that will probably succeed in order to excuse the non-compliance with the Rules. He therefore granted the Application to enlarge time to file and serve the notice of appeal.
17. I turn now to consider whether such a ground is apparent in the instant case.
18. *In Adarsh Vikash Sharma and Neelam Deo ... Plaintiff* and *Rohit Kumar ... Defendant* : Suva High Court Civil Action No. HBC 34 of 2013, where the Defendants contended that the Plaintiff could not institute the proceedings under Order 113 of the RHC as the Defendants were previous owners and not

trespassers, Amaratunga J nevertheless granted the Plaintiffs immediate possession of the premises described in the originating summons.

19. I therefore find and so hold that the Plaintiff has satisfied me that he has a ground of appeal that would probably succeed and which will excuse the delay in the filing of this application.
20. I will therefore allow the Plaintiff's Application and grant him leave to file and serve the Notice of Appeal against the Master's Order within seven (7) days from the date hereof.
21. I order that the costs of this Application, which I summarily assess at \$500.00 shall be the Defendants' in any event.

**Dated this 4<sup>th</sup> day of November 2015, at Suva.**



David Alfred  
**JUDGE**  
High Court of Fiji