

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA

HBM No. 33 of 2014

(On Appeal from
Lautoka High Court
Civil Action No. HBM 33
of 2014)

BETWEEN : **RANGA SAMI GOUNDAR** of Saweni, Lautoka

APPLICANT

A N D : **THE MANAGER, FIJI NATIONAL PROVIDENT FUND** of
Naviti Street, Lautoka

1st RESPONDENT

A N D : **KANCHAN NARAYAN** formally of Suva but present address
unknown

2nd RESPONDENT

Counsel : Mr V Sharma for applicant
Ms A Rogovakalali for 1st respondent
No appearance for 2nd respondent

Date of Hearing : 29 February 2016

Date of Decision : 03 May 2016

DECISION

Introduction

[01] I have before me an application for extension of time to file notice of appeal and for stay pending appeal.

[02] By summons filed 30 December 2015 the applicant seeks the following:

1. An **ORDER** that leave be granted to the Appellant/Original Applicant to file Notice of Appeal out of time against the Judgment of the Acting Master of the High Court Mr Jude Nanayakkara delivered on the 17th of September, 2015.

2. An **ORDER** that the 1st Respondent does not dispose the monies held in the 1st Respondent's account of the Late Esogaran Gounder under the account No. 1305770 until the final determination of this appeal.
3. An **ORDER** that costs of this application be costs in the cause.
4. Any further relief or order that this Honourable Court deems just and appropriate.

[03] The application is supported by the Affidavit of Ranga Sami Goundar, the applicant.

[04] This application is made pursuant to Order 59 Rule 10 of the High Court Rules 1988, as amended ('HCR') and the inherent Jurisdiction of the Court.

[05] The respondent filed the affidavit of Peni Gonelevu, Manager Employers on behalf of the 1st respondent in reply.

[06] The 2nd respondent neither appeared nor filed any opposition.

[07] At the hearing both parties made oral submission. In addition, they also filed written submissions.

Proposed grounds of Appeal

[08] The applicant intends, if leave granted, to rely on the following grounds of appeal:

- a) *That the Learned Master erred in law and in fact in holding that the deceased member's nomination is valid however, failed to consider that the nomination of the 2nd Respondent as a spouse is void/voidable due to the nullity granted on the 13th of March, 2008.*
- b) *That the Learned Master erred in law in holding that Section 57 of the Fiji National Provident Fund Decree 2011 only applied in cases where there is unallocated amount under sub-section (1), when the Decree provides that the High Court may make such orders as are just for the disposition of an amount paid.*
- c) *That the Learned Master erred in law in fact in holding that the 100% of the amount is to be paid to the Second Respondent when the High Court has the discretionary power to dispose the said fund to any person with a just claim.*
- d) *That the Learned Master failed to properly interpret and apply section 57 of the Fiji National Provident Fund Decree 2011.*

- e) *The Learned Master's decision is contrary to the evidence and the developing principles in the area of law relating to the provisions of section 57 of the Fiji National Provident Fund Decree 2011.*
- f) *That the Learned Master erred in law and in fact in awarding the 1st Respondent costs which was excessive in the circumstances.*

Background

[09] Ranga Sami Goundar ('the applicant') filed an originating summons before the Master and sought orders:

- 1) *that the nomination made by the Deceased in favour of the nominal 2nd Respondent is null and void in view of the marriage dated 23rd February 2007 between the deceased and the 2nd Respondent being declared absolutely null and void by the Family Court Division of the High Court at Suva.*
- 2) *that the 1st Respondent pay the Applicant all the monies standing in credit in the membership of the Deceased Esogaran Goundar under FNPF no 1305770 within 14 days from the date of the order.*

[10] The applicant's son Esogaran Goundar was a teacher. In February 2007 he got married a Kanchan Narayan, the nominal 2nd respondent. In May 2008 the High Court declared the marriage null and void on an application made by Manchan.

[11] He had nominated the 2nd respondent for his FNPF savings. However he did not change or cancel the nomination after the order of nullity of the marriage.

[12] From January 2008, Esogaran was residing with the applicant and his family after he felt sick. He (Esogaran) died on 13 January 2014 following discharge from the hospital.

[13] Kanchan did not communicate with Esogaran or his father or other family members. She did not attend the funeral or perform any funeral or post funeral rights.

[14] The applicant made application to 1st respondent (FNPF) to release the Esogaran's savings to him as next of kin. The respondent refused his

application and advised him that as per records Kanchan Narayan is the nominated beneficiary and that the nomination does not change get nullified after nullity of marriage.

[15] The applicant applied to court for an order that all the monies held in the FNPF Account of Esogaran under FNPF No.1305770 be paid out to him (applicant).

[16] The learned Master heard the application and by his order dated 17 September 2015 dismissed the application. In his order he stated that:

“For the reason which I have endeavoured to explain, I have no doubt and I am clearly of the opinion that Section 57(4) of the FNPF Decree 2011 has no application even by any stretch of imagination to the instant case.”

[17] The applicant did not appeal the decision of the learned Master within the stipulated time. He now seeks leave of the court to file appeal the decision out of time.

The Law

[18] The Appellant has relied on Order 59 Rule 10 of the HCR which states:

‘(1) An application to enlarge the time period for filing and serving a notice of appeal or cross – appeal may be made to the Master before the expiration of that period and to a single judge after the expiration of that period.

(2) An application under paragraph (1) shall be made by way of inter-parte summons supported by an affidavit.”

[19] O.59, r.10, HCR need to be read with rule 9, which provides:

Time for appealing (O.59, r.9)

‘An appeal from an order or judgment of the Master shall be filed and served within the following period-

(a) 21 days from the date of delivery of an order or judgment;

(b) In the case of an interlocutory order or judgment, within 7 days from the date of the granting of leave to appeal.

Test for granting extension of time

[20] The governing principles for the granting of leave to appeal out of time are as follows:

(i) Length of delay;

(ii) Reason for the delay;

(iii) Chance of appeal succeeding if time for appeal is extended; and

(iv) Degree of Prejudice to the Respondent if application is granted.

(See, **Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund** [2010] FJCA 3; Miscellaneous Case 020.2009 (3 February 2010), **Kumar v Commissioner of Police**, Fiji Court of Appeal Civil Appeal NO. ABU 0059 OF 2004 (10 March, 2006), **Nair v Prakash** [2013] FJCA 147; Misc. Action 10.2011 (30 October 2013) & **Tora v Housing Authority** [2002] FJCA 16; ABU0036.2002S (15 November 2002))

Discussion

[21] The applicant has applied to court for leave to appeal the decision of the learned Master delivered on 17 September 2015, whereby the Learned Master dismissed the application made by the applicant stating that section 57 (4) of the FNPF Decree has no application to the case.

[22] An appeal from an order or judgment of the Master must be filed and served within 21 days from the date of delivery of an order or judgment, see O.59, r.9.

[23] ***Length of delay:*** - The judgment intended to appeal against was delivered by the Learned Master on 17 September 2015. The applicant has filed his application for enlargement of time to file appeal on 30 December 2015. The time allowed for filing appeal is 21 days of the

delivery of the Master's judgment. The applicant ought to have filed notice of appeal on or before 7 October 2015. The length of delay in this case is 2 months and 23 days. The delay has been substantial.

[24] The court may grant leave to appeal out of time despite the substantial delay if there is a ground of some merit.

[25] His Lordship Justice Calanchini, President of the Court of Appeal in **Habib Bank Ltd v Ali's Civil Engineering Ltd** [2015] FJCA 47: ABU7.2014 (20 March 2015), where the delay was substantial being a period of a few days short of 8 months, observed (at page 7):

'Therefore, in my judgment, this is a case where, despite the substantial delay and the alleged mistaken belief as to the status of the judicial officer, the appropriate test should be whether there is a ground of some merit that would justify allowing the appeal to go before the Court of Appeal. This test is not as generous as establishing that the appeal will probably succeed...'

[26] His Lordship Chief Justice Gates in **Native Land Trust Board v Khan** [2013] FJSC 1; CBV0002.2013 (15 March 2013) declined to grant an extension of time where the delay was over 3 months.

[27] **Reason for the delay:** - The applicant sets out the explanation for the delay in his affidavit in support. In paras 6 to 9 of the affidavit in support the applicant states:

6. **THAT** I wish to file an appeal against the Learned Master's Ruling delivered on the 17th of September, 2015.
7. **THAT** unfortunately, I was not able to instruct my Solicitors until now as I am 72 years old and currently in a very bad health condition. I am suffering from diabetes mellitus and the 20th of November, 2015. These conditions, inter alia, made me incapable of filing legal documents. During the months of September, and October I was incapable of leaving my house as I was completely bed-ridden. Annexed hereto and marked "RS 1" is a copy of my medical report.

8. **THAT** I am advised by my solicitors and verily believe that I have valid arguable grounds for appeal. The proposed Grounds of Appeal are annexed herein and marked as "RS2".
9. **THAT** the monies held with the 1st Respondent belong to my late son Esogaran Gounder. I was dependent on him for livelihood as I am retired and unemployed and so is my wife. The second Respondent in this matter was married to my son as such a nomination was made in her favour on the 9th of March, 2007. However, let the record show that subsequently on the 13th of May, 2008, a nullity was given between my son the 2nd respondent. Surely, there was no intention by my son to give any monies held in his account after the nullity to the 2nd Respondent. I believe the Learned Master failed to consider the full weight of the Fiji National Provident Decree, the facts of the case, the intentions of the Drafter's and the powers of the High Court in disposing monies held in the 1st Respondent's account in a Just and Equitable manner, and to the rightful parties.

...

[28] The respondent (FNPF) filed an affidavit of Peni Gonelevu (Manager Employers) in reply. In paras 15 and 16 of the affidavit in reply the respondent states:

'...

15. **FURTHER** the Fund states that the 2nd Respondent was notified that she was the valid nominee of the deceased and she has since attended the FNPF office on the same.
16. **THE** Fund vigorously denied paragraph 12 of the Applicant's Affidavit and says as follows:

(i) The Fund is bound by the provision of the FNPF Decree to release the FNPF funds to the 2nd Respondent. To allow the appeal application to succeed would greatly prejudice the Fund as it would compromise the powers and functions of the Board stipulated under the FNPF Decree.

(ii) Secondly, if the current application before the Court was to succeed, the Fund would be prejudiced in that any third party would follow suit from these proceeding and open a floodgate of unnecessary lawsuits of similar nature against the Fund. It could also follow that the 2nd Respondent may proceed to filing a lawsuit against FNPF for not complying with the law in failing to releasing the monies to her.

...

[29] The applicant is 72 years old. He is suffering from diabetes mellitus. He states that during the months of September and October he was incapable of leaving his house as he was completely bed-ridden. The medical report dated 18 December 2015 ('RS-1') submitted to court confirms what he says. Dr Deo Narayan, Consultant Physician at Lautoka Hospital in the medical report certifies the applicant's medical condition as follows:

'This is to certify that Mr Gounder was admitted in the Lautoka Hospital during the period 08/11/15 to 20/11/15 with pneumonia. He also has underlying diabetes mellitus and heart condition.

He has been followed up in the clinic since after discharge from hospital, the last clinic being on 18/12/15.

During the mentioned period he went into acute confusional (sic) state and he was not in a position to sign any legal documents.

...

[30] The 1st respondent's affidavit in reply mostly deals with legal issues. It states that the deceased member had filed a nomination after he got married the 2nd respondent and that the nullity of the marriage between the deceased member and the 2nd respondent did not change the validity of the member's nomination.

[31] I have carefully considered the explanation given by the applicant for the delay in appealing the Master's decision. It is apparent the applicant at the age of 72 was incapacitated by his illness. This has been supported by a medical report. I am therefore satisfied with the explanation given for the delay.

[32] ***Chance of appeal succeeding if time for appeal is extended:*** -The grounds of appeal raise some questions of law. Especially, proposed

ground (d) involves in the interpretation of sections 34 and 57 of the Fiji National Provident Fund Decree 2011 ('FNPFD').

[33] The ground of appeal (a) calls upon the appellate court to decide whether the deceased member's nomination is valid despite the fact that the nomination of the 2nd respondent as a spouse even after the nullity granted on 13 March 2008.

[34] Counsel for the applicant, Mr V Sharma submits that the 2nd respondent cannot be taken as to be the spouse or former spouse as any marriage or relation between the 2nd respondent and Esogaran Goundar was declared a nullity as of 13 March 2008. He also submits that the substantive action and claim carries a degree of public interest, whereby the interpretation of section 57 of the FNPFD is in question.

[35] Conversely, Ms Rogovakalali, counsel for the 1st respondent submits that leave to appeal out of time should be refused as the applicant failed to show that he has meritorious grounds of appeal that warrant appellate court's consideration.

[36] Undoubtedly, proposed grounds of appeal raised some questions law that need to be considered by the court.

[37] Even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy, see **Beedell v West Ferry Printers Ltd** [2001] EWCA Civ 400, [2001] 1CR 962.

[38] Having carefully considered the proposed grounds of appeal, I am satisfied that they are meritorious. I am also satisfied that the grounds of appeal have real prospect of success.

[39] Degree of Prejudice to the Respondent if application is granted: - I now turn to the test whether the 1st respondent will be prejudiced if the application is granted.

[40] The applicant claims that he is entitled to the FNPF standing in the FNPF account of the deceased member, his son on the basis that the 2nd respondent's nomination is invalid as a result of nullity of the marriage between his son and the 2nd respondent.

[41] The 2nd respondent is not interested in these proceeding though she was served with the summons. I have little doubt whether she is interested in claiming the fund. If she were really interested she would have appeared in court to contest the proceedings. Only the 1st respondent states that the 2nd respondent made a claim over the phone. The 1st respondent is unable to disclose any written claim made by the 2nd respondent as nominee.

[42] I do not think the 1st respondent will be prejudiced if the application to appeal outside the prescribed time is granted. The real dispute is between the applicant and the 2nd respondent, and not with the 1st respondent. Therefore, there is no question of any prejudice arising to the 1st respondent.

[43] The submission advanced by the 1st respondent that if the applicant was to succeed in the present application, this would greatly prejudice the Fund as it would compromise the powers and functions of the Board stipulated under the Decree has no merit.

Conclusion

[44] An application to extend time must be viewed by reference to the criterion of justice, and it is important to bear in mind that time limits are there to be observed, and that justice may be seriously defeated if there is any laxity in this regard. The length of delay in this case is 2

months and 23 days, which is a significant period of delay. The delay has been explained satisfactorily. The applicant was unable to instruct his solicitors to file an appeal due to his illness and subsequent hospitalization. The supervening event in combination forms exceptional circumstances. I have given particular weight to the prospect of success on appeal upon the proposed grounds of appeal. There is an issue of general or public importance. Further, there is no question of any prejudice to the 1st respondent. In the circumstances I would grant leave to appeal out of time. I direct the applicant to file and serve the notice of appeal within 7 days from the date of this ruling. I would order costs shall be in the appeal.

Final outcome

1. Leave granted to the applicant to appeal the Master's decision dated 17 September 2015.
2. Notice of appeal to be filed and served in 7 days of this ruling.
3. Costs shall be in the appeal.

M H Mohamed Ajmeer
3/5/16

.....
M H Mohamed Ajmeer

JUDGE



At Lautoka

3rd May 2016

Solicitors

For applicant: Messrs Vijay Naidu & Associates, Barristers & Solicitors

For 1st respondent: Legal Services Section, FNPF, Lautoka