

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 91 of 2019

IN THE MATER of Part XXIV of the Land Transfer Act 1971

BETWEEN

MESAKE WAQA of 242 Rewa Street, Suva in the Republic of Fiji.

APPELLANT (Original 1st Defendant)

AND

K. BHINDI BROTHERS LIMITED a limited liability company having its registered
office at Suva in the Republic of Fiji.

FIRST RESPONDENT (Original Plaintiff)

AND

FIJI PUBLIC TRUSTEE CORPORATION LIMITED as Administrator
De-Bonis-Non for the Estate of Josevata Cava, having its registered
office at Public Trustee House, 83 & 85 Amy Street,
Suva in the Republic of Fiji.

SECOND RESPONDENT (Original 2nd Defendant)

Counsel : Mr. Nawaikula N. for the Appellant
Mr. Kapadiya V. for the 1st Respondent

Date of Hearing : 20th October 2020

Date of Ruling : 12th November 2020

RULING

(Leave to appeal out of time)

[1] The 1st respondent instituted these proceedings by an originating summons pursuant to Section 169 of the Land transfer Act 1971, seeking the following orders:

That the defendants give immediate vacant possession to the plaintiff's land comprised and described in Certificate of Title No. 12725 being Lot 6 on DP No. 2280 on which the Lease No. 66899 is registered and is situated at 240 Rewa Street, Suva and occupied by the 1st defendant and that the costs of this application be paid by the defendants to the plaintiff.

[2] The learned Master of the High Court on 18th May 2020 made the following orders:

17. Hence an order is granted in favour of the plaintiff that is the defendants are to give vacant possession of the property described in certificate of title No. 12725 being Lot 6 on Deposited Plan No.2280 containing 32.8 perches and situated at 240 Rewa Street, Suva.

18. The first defendant shall also pay the plaintiff costs assessed atn\$1,000 in 14 days.

[3] The appellant, on 1st June 2020 filed grounds of appeal with notice of intention to appeal but failed to comply with the provisions of Order 59 rule 17(2) and the appeal was deemed abandoned.

- [4] The court on an application by the 1st respondent granted leave to issue writ of possession and the vacant possession of the property has already been handed over to the 1st respondent.
- [5] The appellant then filed the present application for leave to appeal out of time pursuant to order 59 rule 10 of the High Court Rules 1988 which was objected to by the 1st respondent.
- [6] The factors which are normally taken into account in deciding whether to grant an extension of time were conveniently discussed by Byrne JA in **Mokosoi Products Fiji Ltd –v- Pure Fiji Export Limited** (unreported ABU 17/2008 delivered 7 September 2009). At page 10 of the unreported decision Byrne JA stated:

Palu v Australia and New Zealand Bank [2013] FJCA 11; Miscellaneous 19.2011 (8 February 2013) the Court of Appeal said;

"In Bahadur Ali and Ors v. Ilaitia Boila and Chirk Yam and Ors, Civil Appeal No. ABU0030 of 2002 Reddy, P then President of Court of Appeal said at p7 -

"The power to extend the time for appeal is discretionary, and has to be exercised judicially, having regard to established principles (see *Hart v Air Pacific Limited*, Civil Appeal No. 23 of 1983). The onus is on the Appellants to satisfy the Court, that in the circumstances, justice of the case requires that they be given the opportunity to attack the Orderand the judgment.....The following factors are normally taken into account in deciding whether to grant an extension of time-

1. the length of delay
2. reasons for delay
3. the chances of the appeal succeeding if time is extended
4. prejudice to the respondent.

More recently, this Court has taken a much stricter approach to applications for leave to extend the time to appeal. In Vimal Construction and Joinery Works Ltd v. Vinod Patel and Company Ltd (2008) FJCA 98; the Court of which I was a member said at paragraph 15, signaling the new stricter approach, at para [15]-

.....in 2008 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."

[7] In this case the judgment sought to be appealed was delivered on 18th May 2020, grounds of appeal was filed on 01st June 2020 and the application for leave to appeal out of time was filed on 21st August 2020. In explaining the delay the appellant states in his affidavit that the delay was due to an innocent oversight and not due to neglect and trying to fix that immediately by the present application. This, in my view, is not a sufficient explanation for the delay. Anyone can say that the failure was due to an oversight without explaining what prevented him from taking steps to prosecute the appeal within the time period prescribed by law.

[8] Following are the grounds of appeal relied on by the appellant:

1. The Master erred in law and/or in fact in saying that the appellant as the beneficiary of Josevata Caca does not have a right to reside in the property as the 1st respondent has not given him a license to reside on the said land. [Page 5 of the Judgment].
2. The Learned Master erred in law and/or in fact in saying that the 1st respondent's purported rescission of lease has an impact on distinguishing the appellant's right to the land. [Pages 6, 16 of the judgment].
3. The Learned Master erred in law and/or in fact in ruling that without any evidence of payment by the appellant of the rate, the appellant therefore has extinguished his rights to the land. [Para 6, 16 of the judgment].
4. The Learned Master erred in law and/or in fact in wrongly interpreting section 172 of the Land Transfer Act as it relates to the appellant's right to the land as beneficiary of his late father's estate which right is evidenced by the lease registered against title.

[9] The learned counsel, at the hearing of this application did not make any submissions on the question whether the appellant has a chance of the appeal succeeding if time is extended.

- [10] It is not in dispute that the 1st respondent is the registered proprietor of the property which is the subject matter of this action and the appellant's father Josevata Cava was the lessee of this property and upon the demise of his father Letter of Administration De-Bonis-Non was granted to the 2nd respondent.
- [11] When proceedings are instituted pursuant to section 169 of the Land Transfer Act 1971 the burden shifts to the defendant to show cause why he refuses to give possession of the property. I have carefully read the judgment of the learned Master and could not find any defect in it. She has taken into consideration the fact that the appellant has not paid rent, outstanding rates which is amounting to \$51,006.57 and the lease cannot be transferred, sublet, assigned or part with, without the consent of the lessor. The appellant has therefore, failed to satisfy this court that he will be successful in appeal if the extension of time is granted.
- [12] The learned counsel for the 1st respondent submitted that the 1st respondent would suffer greater prejudice if the application is allowed as the writ of possession had already been executed. Since the 1st respondent is now in possession of the property granting of leave to appeal out of time would cause no prejudice to the 1st respondent.
- [13] The learned counsel submitted that once the appeal is deemed abandoned the appellant has no right to bring this application for leave to appeal out of time.
- [14] In this regard the learned counsel cited two decisions of Amaratunga J.
- [15] In **Aviel Battzion aka Unise Ranadi v Graphic Equipment Ltd and Anor** HBC 370 of 2013 summons was filed seeking to reinstate the appeal that was deemed abandoned which the court rightly refused. This decision is not relevant to the matter before this court for the reason this is not an application to reinstate the appeal deemed abandoned.
- [16] The other decision is **Vanualevu Hardware Fiji Ltd v Labasa Town Council [2018] FJHC 177; HBC29.2012 (15 March 2018)**.
- [17] In that case an application was filed seeking extension of time to appeal because the appellant failed to take steps as required by Order 59 rule 17(2) and the appeal was deemed abandoned.

In paragraph 10 Amaratunga J. held:

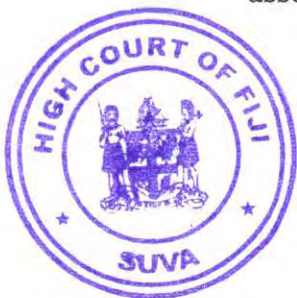
This application for extension of time can be rejected on case management ground as well. The rules of the court and procedural laws are all made for smooth functioning of the court system and also to provide optimum utilization of time and resources of the court for expeditious results. There is a determination by Master. Though it is subject to an appeal when the appeal is deemed abandoned, the same party cannot seek extension of time to file another 2nd Notice of Appeal. If so there will not be an end to such applications of extension of time to file. This is an encouragement to abuse of process.


[18] I beg to defer from the above findings of the court for the reason that a party who fails to take certain steps within the period of time prescribed by law for reasons beyond his control, should not be deprived of his opportunity to come before the court and explain why he could not comply with such requirements. If this principle is to be applied commonly a party who could not file and serve the notice and grounds of appeal in time would not be able to seek extension of time to appeal.

[19] In this matter since the appellant has failed to satisfy the court that he has grounds of appeal which could be successfully maintain if an extension of time is granted and that there any substantive defects in the judgment of the learned Master, the application for leave to appeal out of time is liable to be refused.

ORDERS

1. The application of the appellant seeking leave to appeal out of time is refused.
2. The appellant is ordered to pay the 1st respondent \$1000.00 as costs (summarily assessed).




Lyone Seneviratne

JUDGE

12th November 2020