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

APPELLATE JURISDICITION

CIVIL ACTION NO. HBM 28 OF 2019

BETWEEN : **VICTOR SHAN ALI** of 133 Kennedy Avenue, Nadi.

APPELLANT
(Original Plaintiff)

A N D : **FRANK NAIVALUWAQA** and **CAROLINE BARBARA NAIVALUWAQA** trading as **PEARL INVESTMENTS PACIFIC PTE LIMITED** of Lautoka.

RESPONDENTS
(Original Defendants)

Appearance : **Mr Vikrant Chandra for the appellant**
(Ms) Natasha Khan for the respondents

Hearing : **Thursday, 02nd December, 2020 at 9.00 am**

Decision : **Friday, 05th February, 2021 at 9.00 am**

D E C I S I O N

[A] INTRODUCTION

(01) The appellant filed amended summons on 30-07-2019 seeking leave to file notice of intention to appeal and grounds of appeal out of time against the judgment of the Magistrate at Lautoka, delivered on 26-06-2019. The application was filed pursuant to Sections 36(1) (a), 38, 39 of the Magistrate's Court Act and Order 3, rule 4, and Order 55, rule 3(3) of the High Court Rules, 1988.

(02) The application is supported by an affidavit sworn by the appellant on 17-09-2019 and filed on 24.09.2019.

(03) The application was vigorously opposed by the respondents. It should be noted that the respondents did not file an answering affidavit, a course which they were entitled to take.

[B] THE ISSUES TO BE DETERMINED

Whether the time limit for filing notice of intention to appeal and grounds of appeal be extended?

[C] JURISDICTION

(1) Statutory provision for time to file Notice of Intention to Appeal

It is **Order 37, Rule 1** of the Magistrates' Court Rules which sets out the time within which **notice of intention to appeal shall be given.** The Order reads as follows:

> 1. *Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:*

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.

This is a **mandatory rule** and it does not give the Magistrate power to extend time.

Had the legislature intended it could have specifically provided for application to extend time? It did not do so in **Order 37, R.1 but Order 37 R.4** which provides as follows gave the Magistrates' Court power to extend time to file **grounds of appeal.**

> 4. *On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.*

(2) Order III, rule 8 of the Magistrates' Court Rules provides;

8. *In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause, matter, case or event, the court and/or the clerk of the court and/or the parties shall be guided by any relevant provision contained in the Supreme Court Rules.*

(3) Putting the matter shortly at this stage, the Court can derive support for the jurisdiction to permit relaxation of the rules by virtue of the general provision contained in Order 3, rule 4 of the High Court Rules, 1988.

Only two authorities need be cited on this legal point. They are;

* **Costerfield Ltd v Denarau International Ltd & Others**[1]

* **Veilave v Naicker**[2]

(4) For the sake of completeness, Order 3, rule 4 is reproduced below in full.

Order 3, rule 4 of the High Court Rules, 1988 provides;

Extension, etc., of time *(O.3, r.4)*

4.(1). *The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.*

(2). *The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.*

(3). *The period within which a person is required by these Rules, or by any order or direction to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.*

Provided that wherever the period for filing any pleading or other document required to be filed by these rules or by the Court is extended

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[1] Civil Action No. 214 of 2012 (07-02-2018)

[2] (2017) FJHC 131; HBC 159.2013

whether by order of the Court or by consent a late filing fee in respect of each extension shall be paid in the amount set out in appendix II by the Party filing the pleading or other document unless for good cause the Court orders that some or all of the same be waived.

(5) I will pause here to consider the principle underlying the exercise of the courts discretion when an extension of time is sought under Order 3, rule 4 (Order 3, rule 5 in U.K).

(6) The following passage of "Bingham" M.R in **Costellow v Somerset**[3] is illuminating;

> *'We are told that there is some uncertainty among practitioners and judges as to the appropriate practice in situations such as this. It is plainly desirable that we should give such guidance as we can. As so often happens, this problem arises at the intersection of two principles, each in itself salutary.* ***The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed****. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution. The* ***second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate.*** *This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.* ***Neither of these principles is absolute.*** *If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule.* ***The resolution of problems such as the present cannot in my view be governed by a single universally applicable rule of thumb****. A rigid, mechanistic approach is inappropriate. Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since, in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application*

[3] (1993) (1) ALL.E.R. 952 at 960

is made or not. Cases involving procedural abuse (such as Hytrac Conveyors Ltd v Conveyors International Ltd [1982] 3 All ER 415, [1983] 1 WLR 44 or questionable tactics (such as Revici v Prentice Hall Inc [1969] 1 All ER 772, [1969] 1 WLR 157) may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of after the issue of proceedings has caused at least a real risk of prejudice to the defendant. A similar approach should govern applications made under Ords 19, 24, 25, 28 and 34. The approach to applications under Ord 3, r 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord 3, r 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.'

(Emphasis added)

(7) In **Mortgage Corp Ltd v Sandres**[4] the Court laid down the general guideline as follows;

'The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules or directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports; it was intended to be of general import. Lord Woolf, Master of the Rolls and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court: 1 Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed. 2 At the same time the overriding principle was that justice must be done. 3 Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation. 4 In addition the vacation or adjournment of the date of trial prejudiced other litigants and disrupted the administration of justice. 5 Extensions of time which involved the vacation or adjournment of trial dates should therefore be granted only as a last resort. 6 Where time limits had not been complied with the parties should co-operate in reaching an agreement as to new time limits which would not involve the date of trial being postponed. 7 If they reached such an agreement they could ordinarily expect the court to give effect to that agreement at the trial and it was not necessary to make a separate application solely for that purpose. 8 The court would not look with favour on a party who sought only to take tactical advantage from the failure of another party to comply with time limits. 9 In the absence of an agreement as to a new timetable, an application should be made promptly to the court for directions. 10 In considering whether to grant an extension of time to a party who was in default, the court would look at all the circumstances of the case including the considerations identified above.'

(8) As I understand the authorities, the grant of an extension of time under this rule is not automatic. The object of the rule is to (as I understand the rule), ensure that those rules which fix times for doing acts do not become instruments of injustice.

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[4] (1996) TLR 751

The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties.

[D] PRINCIPLES TO BE APPLIED

(1) Against that background, it is necessary to turn to the judicial thinking in relation to the principles governing the exercise of the discretion to make the order the appellant now seeks. As noted, this is an application to extend the time to file Notice of Intention to Appeal. Whether or not to extend the time is essentially discretionary. The discretion of the Court, as I conceive it, a perfectly free one, the only question is whether, upon the facts of the present case, whether the discretion should be exercised. The Court has to consider whether it is in the interest of justice, having regard to the whole history of the case, to extend the time. **Avery v No.2 PSA Board**[5]

(2) Commenting on the discretion, Lord Donaldson of Lymington in **Norwich and Peterborough Society v Steed**[6] said;

> *"Once the time for appealing has elapsed, the Respondent who was successful in the court below is entitled to regard the Judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would- be appellant. The classic statement of the elements of this equation is to be found in the judgment of Griffiths L J in C M Van Stillevoldt BV V EL Carriers Inc (1983)(1)ALL.E.R 699, (1983) (I) W.L.R 207, which are set out in the Supreme Court Practice 1991 VOL 1, para 59/4/4 and are, as Mc-cowan LJ set them out, namely;*
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> - *The length of the delay*
> - *The reasons for the delay*
> - *The chances of the appeal succeeding if an extension of time is granted*
> - *The degree of prejudice to the Respondent if the application is granted."*

(3) The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in **NLTB** (now **iTLTB) –v-**

[5] (1973) NZLR 86, 91 (CA)
[6] (1991) 2 ALL.E.R 880

Ahmed Khan and Another[7] . In summary, the Court considers (a) the length of the delay, (b) the reasons for the delay, (c) whether there is a ground of merit justifying the appellate court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged will the respondent be unfairly prejudiced? Apart from being exercised in a principled manner the discretion also should be exercised in a manner that re-enforces the importance of compliance with the rules of Court and the need to bring finality to litigation[8].

See * Herbert Construction Company (Fiji) Ltd v Fiji National Provident Fund
[2010] FJCA 3

* Kumar v Commissioner of Police
Fiji Court of Appeal Civil Appeal No: ABU 0059 of 2014

* Nair v Prakash
(2013) FJCA 147

* Tora v Housing Authority
(2002) FJCA 16

* A.G. v Sharma

(ABU 0041 935) FJCA

[E] ANALYSIS

1. Before passing to the substance of the appellant's summons for extension of time to file notice of intention to appeal and grounds of appeal, let me record that Counsel for the appellant and the respondents in their written submissions have done a fairly exhaustive study of the judicial decisions and other authorities which they considered to be applicable.

   I interpose to mention that I have given my mind to the written submissions and the judicial authorities referred to therein.

2. Now let me proceed to examine the appellant's summons for extension of time to file notice of intention to appeal.

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[7] CBV 2 of 2013; 15 March 2013
[8] Mc Caig –v- Abhi Manu, CBV 2 of 2012; 24 April 2013

Moreover, 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**[9] . At page (06) of the unreported decision Byrne JA stated:

> *"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 Order … and 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]-*
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> > *"[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."*

[F] THE REASON FOR THE FAILURE TO FILE WITHIN TIME

(01) The appellant in his affidavit in support states that the written ruling was typed and provided to his solicitors a few days later after it was pronounced on 26th June, 2019.

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[9] Unreported ABU 17/2008, delivered on 7th September 2009

(02) Further, he states that by the time the written ruling was provided, and he was informed of the same by his solicitors, seven-day time period for filing of the notice of intention to appeal had passed.

(03) The respondents submit that the appellant had failed to indicate in his affidavit in support, the exact date on which his solicitors received the written ruling and the date on which he was made aware of the same by his solicitors. He has just mentioned that he received the written ruling some few days later.

(04) As such, it is not clear from his affidavit in support whether the appellant's solicitors received the typed ruling within seven days, so as in time to file his notice of intention to appeal.

(05) The explanation regrettably lacked candor.

[G] THE LENGTH OF THE DELAY

(01) The learned Magistrate had delivered his ruling on 26th June, 2019 and the appellant had 30 days to appeal.

(02) In terms of Or.37, rule 1, the time for giving notice of intention to appeal began to run from 26th June, 2019 and expired on 3rd July, 2019.

(03) The appellant in his affidavit in support stated that the initial summons for enlargement of time was filed on 22nd July, 2019, which according to him was within the 30-day appeal period.

(04) He further states that the summons had to be amended as there were some defects.

(05) **The appellant then filed his amended summons on 30th July, 2019, and the affidavit in support almost two months later on 24th September, 2019.**

(06) In ***Tevita Fa vs Tradewinds Marine Ltd and Oceanic Developers (Fiji) Ltd,***[10] the application for leave to appeal was filed 4 days after the end of the period of six weeks. Thompson J. said;

> *That is a very short period, but time-limits are set with the intention, that they should be observed and even lateness of only four days requires satisfactory explanation before an extension of time can properly be granted.*

[10] Civil Appeal No. ABU 0040 of 1994

(07) In ***Aaryan Enterprise vs Mehak Unique Fashion,***[11] Justice Calanchini (as he then was) said that a delay of 19 days was extensive.

(08) In ***Queen v Brown,***[12] as cited by Justice Gates in ***Kamlesh Kumar and Mesake Sinu v The State,***[13] the Court said:

> *In the cases cited the delay ranged from a little over a month (in R. vs Rhodes) to more than three months (in R vs Cullum). In R vs Marsh, where the delay was about two months, the rule laid down is that, where the delay is substantial, extension will not be granted unless the Court is satisfied that there are such merits that the appeal will probably succeed.*

(09) The respondents submit that the present application was filed on 25th September, 2019, and there was a delay of almost two months, which is quite substantial.

(10) **There are 27 days [03.07.2019 to 30.07.2019] between the expiry of time for filing the notice of intention to appeal and the filing of the amended summons for extension of time. Turning to the period of delay, it is 27 days, which on any view of it is substantial. The length of the delay is long and is not excusable. These delays cause great hardships, amounting to very real injustice to the respondents. Under the system that exists at the moment, how in the world could the respondents know whether there is any possibility of an appeal?**

(11) I have no hesitation in saying that the reason for the failure to file notice of intention to appeal within time lacks candor and cannot be supported in law. The delay in filing the summons for extension is substantial and the reasons for that delay are both unsatisfactory and unconvincing. Even if the reasons for the delay are not excusable, it has been the practice to grant an extension if there are merits in the application when the grounds of appeal are considered.

There was unreasonable delay in bringing the present application before this Court and such delay has not been satisfactorily explained. In such a situation the appellant will carry a heavy burden to satisfy the Court that extension ought to be granted in the interests of justice.

Where the delay is slight, it is generally unnecessary to go into merits because the merits play little part but when the delay is very much longer, much more merit is required to overcome it. **See, Norwich and Peterborough Building Society v Steed**[14]**.**

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[11] Civil Appeal No. 17 of 2011 (10 November 2011)
[12] (1963) SASR 190 at 191
[13] Criminal Appeal Nos. CAV000/09 and 0001/10
[14] (1991) 2. ALL.E.R 880.

(12) Nevertheless, I am bound to consider the intended grounds of appeal urged on behalf of the appellant on account of the following decisions;

- **Vimal Construction and Joinery Ltd v Vinod Patel and Company Ltd[15].**
- **Maciu Tamani Palu aka Maciu Tamanibola Palau and Australia and New Zealand Bank[16].**

(13) This does not involve a detailed consideration of the intended grounds of appeal nor does it amount to an attempt at this stage to determine the appeal. However, it is necessary to assess the merits of the intended grounds of appeal in order to determine whether there is sufficient basis to excuse the substantial delay and to allow the appeal to proceed to the High Court.

I venture to say that the obtaining of the grant of an enlargement of time is not a mere administrative step. It is entirely a matter for the discretion of the Court. **See; Nestle v National Westminster Bank PLC[17].** When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal[18].

[H] WHETHER THERE IS GROUND OF MERIT JUSTIFYING THE COURT'S CONSIDERATION?

(01) I now turn to the intended grounds of appeal. The intended grounds of appeal are;

1. *That the learned Magistrate erred in law when he considered that Prayer One would be an order of Mandamus can be misused as an order forcing the Housing Authority to comply with such orders.*

2. *That the learned Magistrate erred in law and in fact when he failed to consider that the promise of the Respondents under the acknowledgment of debt dated 8th June 2018 was for the Respondent to do all things necessary in transferring Housing Authority sub-lease no. 477472 to the Appellant, which would include seeking the necessary consent of the Housing Authority.*

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[15] (2008) FJCA 98
[16] Misc. 19 of 2011, 08-02-2013
[17] (1990) Times, 23 March
[18] Avery v No. 2 PSA Board, Richmond J 1973 (2) NZLR 92 P

3. *That the learned Magistrate erred in law and in fact in considering that Prayer One would be treated as an order compelling the Housing Authority to provide necessary consent, when in fact Prayer one is an order compelling the Respondents to carry out all things necessary for the transfer of Housing Authority Sub-Lease no. 477472. The transfer process will allow Housing Authority to either deny and/or approve the consent subject to the Housing Act of 1955.*

4. *That the Summarily assessed cost of $200.00 is low in all circumstances.*

(02) (a) Let me go back in time for a moment, on the 8th of June, 2018 the respondents duly executed the acknowledgment of debt in which they provided securities over two of their properties; Housing Authority Sub-Lease No. 477472 and Lot 1 LDSW 462 Pt of Lomolomo Kubunasarava & Togoloa Tiri.

(b) In prayer one of his statement of claim the appellant sought a declaration that the respondents are obliged to transfer the Housing Sub-Lease No. 477472 to the appellant.

(c) The respondents submit that Housing Sub-Leases are protected leases.

(d) The respondents further submit that the control and administration of a housing sub-lease is vested in the Housing Authority by virtue of provisions of the Housing Act No. 37 of 1955.

(03) In reply, Counsel for the appellant citing the Supreme Court of Fiji decision in **New World v Vanualevu Hardware (Fiji) Ltd**[19] submitted that the agreement entered into between the appellant and the respondents does not need the consent of the Housing Authority. Counsel further submitted that the Resident Magistrate erred when he stated that it is necessary for the defendants to acquire the necessary consent from the Housing Authority before entering into any contract/agreement.

(04) That brings me to the facts of the case before the Resident Magistrate.

The appellant in his affidavit of evidence in chief before the lower court stated that he lent respondents a sum of $10,000 on 24-04-2018 and a sum of $8,000.00 on 07-06-2018. He tendered the acknowledgment of debt marked as "A" and "B" with his affidavit. As per the acknowledgment, the respondents have to re-pay the money by 07-07-2018. The respondents failed to repay the debt by 07-07-2018. The appellant sought a judgment against the respondents in the sum of $18,000 and also a declaration that the respondents are obliged to transfer the Housing Authority Sub-Lease.

[19] CBU 0004.206, Date of judgment 21-04-2017,

The defendants (the respondents) were not present at the trial in the lower court. The Resident Magistrate entered judgment in favor of the plaintiff (appellant) in the sum of $18,000.00. The Resident Magistrate declined to make a declaratory order with regards to the transfer of the Housing Authority Sub-lease.

(05) The respondents (defendants) have duly executed the acknowledgment of debt on 08-06-2018 in which they provided securities over two of their properties; (1) Housing Authority Sub-lease No. 477472 and (2) Lot 1 LDSW 462 Pt of Lomolomo, Kubunasaroro & Togoloa Tiri.

(06) The appellant obtained the judgment in his favor in the sum of $18,000.00 together with interest at the rate of 5% per annum on the judgment sum from the date of the judgment and costs of $200.00. The appellant in his proposed notice and grounds of appeal is seeking an order that the respondents transfer Housing Authority Sub-lease No. 477472 to the appellant.

Surprisingly, the appellant is seeking the respondents to repay the debt of $18,000.00 plus interest as well as the respondents' property to satisfy the debt of $18,000.00.

I am in a perfect dilemma. I cannot visualize such a case in practice.

(07) It is true that the appellant has lent and advanced to the respondents a sum of $18,000.00 upon a contract. The money the respondents borrowed is primarily secured against an asset the respondents own namely the Housing Authority Sub-lease No. 477472. The Housing Authority Sub-Lease is pledged on collateral for the loan. The written acknowledgment of debt provides that *"The debtor further warrant that in the event of default, the debtor shall do all things necessary in transferring the above named securities to the Creditor"*. If the respondents don't pay the debt secured by the property, the creditor, the appellant has the right to take the property pledged as collateral for the loan.

So, if the respondents cannot keep up their repayments, the Housing Authority Sub-Lease No. 477472 has to be transferred to the appellant and the respondents have to part with the possession of the premises. This is exactly what was agreed and the intention of the parties. This loan agreement gave rise to binding obligations, to be performed in the event of default in repaying the loan. The Housing Authority Sub-Lease has been used as "collateral" to secure the loan. Collateral is an asset or property that an individual offers to a lender as security for a loan. The Housing Authority Sub-Lease is used as a way to obtain the loan, acting as a protection against potential loss for the lender, the appellant, should the borrower, the respondents default in their payments. In such an event, the collateral namely the Housing Authority Sub-lease No. 477472 becomes the property of the lender, the appellant to compensate for the unreturned borrowed money. The appellant did obtain interest in the land upon the execution of the loan agreement. Therefore, the transaction is caught by Section 16(3) of the Housing Authority Act [Act]. The

transaction is prohibited by statute. As a result, the agreement which constituted the transaction is illegal. The Court cannot render assistance in enforcing an illegal contract.

(08) It is clear that the loan agreement which constituted the transaction involved alienating or dealing with the Housing Authority Sub-Lease No. 477472 without the prior consent of the Housing Authority and therefore, the loan agreement was null and void *ab initio* and of no effect, in that it contravened Section 16(3) of the Act which provides;

> *The Authority shall make it a term of every letting that the tenant shall not assign, sublet or otherwise part with the possession of the premises or any part thereof except with the consent in writing of the Authority and shall not give such consent unless it is shown to its satisfaction that no payment other than a rent which is in its opinion a reasonable rent has been or is to be received by the tenant in consideration of the assignment, subletting for other transaction.*

(09) I venture to say that the transaction was prohibited by statute. As a result, the agreement which constituted the transaction was illegal. The Court cannot render assistance in enforcing an illegal contract.

Scrutton, L.J., clearly indicated in **Mahmoud v. Ispahani**[20], what the position is in relation to an illegal contract when his Lordship said:-

> *"I think the law is laid down in* ***Cape v Rowlands*** *(2 M. & W. 157), where Parke, B., delivering the judgment of the Court said: 'It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, Bartlett v Vinor (Carth. 252). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract? If the contract is prohibited by statute, the Court is bound not to render assistance in enforcing an illegal contract.... .....*
>
> *And in my view, if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition, even though the person breaking the law relies upon his own illegality. I say nothing about the cases to which Parke B., refer in Cope v. Rowlands (2 M. & W. 157, 158), where the statutory prohibition is for the benefit of a particular person, and not for the benefit of the public. It may be that*

[20] (1921) 2 K.B. at p.728

different rules apply to such a case, but in this case it is clear that the prohibition is for the benefit of the public."

(10) Thus, the intended grounds of appeal are not meritorious. The appellant does not, in my view, have any reasonable prospect of success if he proceeds with his appeal. That lack of reasonable success is a major reason why an extension of time to file notice of intention to appeal should not be granted.

[I] PREJUDICE

Counsel for the appellant argues that the respondents suffer no prejudice since the respondents have failed to comply with the order of the Magistrate. I venture to say that the Court is not restricted to such consideration. Everything is left to the discretion of the Court on the wide basis that leave may be granted in such cases as the justice of the case may require. In order to determine the justice of any particular case the Court should have regard to the whole history of the matter, the nature of the litigation and the need of the appellant on the one hand for leave to be granted together with the effect which the granting leave would have on other persons involved.

Clearly the prejudice to the respondents if time for filing a notice of intention to appeal and grounds of appeal are enlarged would be considerable because none of the grounds raised have merits. There is a delay of 27 days between the expiry of time for filing notice of intention to appeal and the filing of the amended summons for extension of time and further uncertainty would be placed upon the respondents by extending the litigation further. The truth is that when a balance is struck between conflicting rights and interests, the scale comes down in favor of the respondents.

ORDERS

(01) The application for extension of time to file notice of intention to appeal and the grounds of appeal is declined.

(02) There will be no order as to costs.

05.02.2021.

Jude Nanayakkara
[Judge]

HIGH COURT OF FIJI
LAUTOKA

High Court – Lautoka
Friday, 05th February, 2021