

IN THE SUPREME COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Petition for Special Leave to Appeal
Civil Appeal No: CBV0007/2014

[on appeal from the Court of Appeal No.
ABU027 of 2012]

[on appeal from High Court Action No.
372 of 2006L]

BETWEEN: **SHIU AJITYA CHARAN**
[as the Executor and Trustee of the Estate of Shiu Charan]

Applicant/Petitioner

AND: **RUP WATI** and **SHIU VIDYA CHARAN**

Respondents

Coram: **The Hon. Chief Justice Anthony Gates,**
President of the Supreme Court

Date of Hearing: **8th December 2014**

Date of Ruling: **17th December 2014**

Counsel: **Mr. D. Naidu for the Applicant [Petitioner]**
Mr. W. Pillai for the Respondents

RULING

- [1] The Petitioner seeks enlargement of time within which to lodge a petition for special leave. The decision of the Court of Appeal which is sought to be impugned was

delivered on 5th December 2013. The 42 days period thereafter within which the lodging of the petition was to have been made under the Rules [Rule 6 Supreme Court Rules 1998] expired on 16th January 2014.

- [2] An inter-partes Notice of Motion seeking “an extension of time for leave (to) file petition for special leave to appeal out of time” was filed on 29.1.14. This was not served on the Respondents’ solicitors through their Suva City agents till 28.2.14, a month later. Though the filing of the Notice of Motion was only 13 days late, in reality the Respondents and their lawyers were unaware that an appeal process was afoot for a period of 43 days after the appeal period had expired.
- [3] This application arising from the civil jurisdiction, and being interlocutory, can be heard by a single judge of the Supreme Court [Rule 11(b)]. The jurisdiction to grant an enlargement of time has been discussed in some detail in a Criminal Case, *Kamlesh Kumar v the State CAV0001.09, 21st August 2012*. The instant case being civil is subject to a greater restriction on the exercise of the discretion.
- [4] In *Eddie McCaig v Abhi Manu CBV0002.12, 27th August 2012* I summarized the position as follows:

“[9] But it must be remembered that whilst in a compelling case, the court may more easily be convinced of a need for intervention in a criminal case with less regard for the prejudice caused to the State as Respondent, the position is different in a civil case. In such cases when exercising civil jurisdiction, the appellate courts have tended to be less lenient, than when considering the position of an Accused person who lodges a late appeal. In civil appeals the court has to be more even-handed and consider equally the rights and interests of the Respondent with those of the applicant: *Latchmi & Anor. v Moti and Others [1964] 10 Fiji LR 138 at 145G per Marsack JA.*”

Principles to be applied

- [5] The appellate courts have found it useful to consider the discretion to enlarge by looking at 5 factors. They are:

- (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?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?

Reasons for the failure

- [6] The petitioner deposed in an affidavit that his solicitor's office was closed for the legal vacation from 23rd December 2013 till 14th January 2014. This does not account however for what had happened immediately after the delivery of the adverse decision of the Court of Appeal on 5th December 2013. There were 18 days left before the solicitors closed their office for the vacation. What was discussed at that time? The High Court's decision in the petitioner's favour had been reversed. Nothing is said of preliminary readings of the judgment or initial discussions with his solicitor and advocate on his chance of success or of his determination to take the matter on appeal.
- [7] Something must have happened because on 14th January 2014, the first day back from the vacation an appeal petition had been drafted and was ready for signing by the Petitioner.
- [8] The Petitioner says he had gone to Suva that day and only returned at 5pm, the same day. He was not able to sign the petition the next day he said (unexplained) and he only signed it on 16th January 2014.
- [9] His brother had passed away on 13th January 2014. The phrase he deposed to was "I was busy attending to his funeral" which was not quite accurate. He had attended his brother's funeral on the day, but because of ill-feeling he was not part of the group of relatives who handled the arrangements. This is covered in the affidavit of the 1st named

Respondent whose husband, the 2nd named Respondent, was the brother who had just died on 13th January 2014. Her statement was not disputed in argument.

- [10] Mr. Pillai rightly criticized this explanation urging that it was an insufficient explanation for failure to file on time.
- [11] In Australia some courts have tended to take a more lenient approach to the overlooking by solicitors of appeal deadlines. In England, which Fiji has traditionally and by statutory provision followed in the absence of its own provisions, has taken a stricter line.
- [12] In *Regina v Donald Burley [1994] Times LR 565*, the English Court of Appeal [Lord Taylor CJ, French and Longmore JJ] made the following observations:

“Their Lordships wished to make it perfectly clear that it was no answer to a failure to observe time limit for solicitors to say *mea culpa*, it is entirely our fault, do not let it redound to the disadvantage of the client.”

.....

The rules were there not simply for perverse reasons but to enable the court to manage its business in a proper manner. If cases were allowed to come in late that meant that other cases, which had been filed in time, would be held back.

Accordingly, the court had to insist that the time limits were obeyed unless there was some very good, exceptional reason for their not being obeyed.”

- [13] Though the period of delay is not particularly lengthy, it was yet compounded by the failure to serve the Respondents promptly once late. In such circumstances the discretion may depend upon the compelling nature of the petition.
- [14] I find the reasons advanced here are inadequate and the delay has not been satisfactorily explained.

The Length of the Delay

[15] The delay here is comparatively short – 13 days out of time, though the petition was not served for 42 days thereafter. The cause of the delay is unmeritorious, unlike the case of the applicant in *Norwich and Petersborough Building Society v Steed* [1991] 1 WLR 449 who had faced considerable difficulties in obtaining legal aid assistance for the appeal. The applicant was allowed time to file late though the delay was lengthy [6½ months] and prejudice would occur to the Respondent.

Whether a ground of merit justifying consideration

[16] The applicant in his petition refers to the “principal” grounds, and then sets out 2 grounds. There can be no principal grounds if that means envisaging further as yet undisclosed grounds. In such applications the grounds relied on must be disclosed at this stage when the discretion is sought to permit an enlargement of time in which the petition is to be filed and served late. It must not be thought that leave can be obtained for a late petition on 2 grounds to be perfected later or at the last minute with 4 more. Leave will, if granted, be confined to the grounds stated at this stage. Only in truly exceptional circumstances would the court permit an amendment of a petition to allow entirely fresh grounds to be introduced and argued, after enlargement has been permitted.

[17] The grounds set out in this petition are as follows:

- (a) That the Learned Judges erred in law in holding that total failure of consideration by the Respondent did not defeat registration of title to C.T. No. 15496 and C.T. No. 13915 in favour of the Respondent.
- (b) That the Learned Judges erred in law in holding that total failure of consideration by the Respondent did not equate to formal defeating registration of the title to C.T. No. 15496 and C.T. No. 13915 in favour of the Respondent.

[18] The plaintiff lived with his family in Vuniyasi, Nadi. His wife died in 1978. Later two of his sisters in law died and he became entitled to two residential properties in Simla. The

plaintiff moved to one of the properties and resided there. The two Respondents joined him. There was unpleasantness between the Respondents and a younger son of the plaintiff, the present executor for the plaintiff's estate. The Respondents moved away from the younger brother therefore. The other house in Simla was rented out.

- [19] Eventually, without a sale and purchase agreement, the plaintiff through a common solicitor transferred the two Simla properties to the two Respondents. The deed said that the consideration was to be \$5000 for each property, which was not to be paid prior to or upon transfer, but in due course. The deed did not state when the monies were to be paid.
- [20] It is obvious these sums bore no relation to the true value of the properties. The 1st Respondent was the plaintiff's daughter-in-law and the 2nd Respondent was his eldest son. These properties were transferred in August 2004. In October 2005 the plaintiff returned to Vuniyasi. A year later in November 2006 he filed action against the Respondents on the ground that they had failed to provide him with food, maintenance, accommodation and medical care, and that they had failed to pay "consideration" of \$10,000. He wanted the properties back.
- [21] The learned High Court judge placed "lack of consideration; fraud and indefeasible principle under section 40 of the Land Transfer Act" as the keywords heading her judgment. She referred to the writ seeking revocation of the transfers on the grounds of misrepresentation and failure to provide consideration.
- [22] The common solicitor in an agreed document, an affidavit, significantly said "since the sale was between father, son and the daughter-in-law, on their instructions a sale and purchase agreement had not been executed. Neither had the parties wanted to pay additional legal fees for the agreement nor had the plaintiff instructed about a family arrangement to the law firm." [para 14 of the High Court judgment]

[23] On the allegation of fraud, and in dealing with this claim separately from that of lack of consideration, the trial judge concluded:

“I therefore conclude that there is no actionable representation by the defendants albeit the existence of a strong moral obligation that they had to look after the elderly father. However, breach of moral obligations does not give rise to an actionable cause of action.”

[24] Though the 2nd Respondent paid for the lawyer’s fees of the transaction, he said he remained outside the office where the transfer was executed. The Respondents were not aware of the \$5,000 purchase price. The monies were not paid. No evidence was given that it had been demanded of the Respondents and that they refused to pay. The judge said “I am convinced that the plaintiff was certain that he wanted to transfer the property not as a gift but upon a consideration of \$10,000.” The defence had claimed the property was transferred “for natural love and affection.” It is abundantly obvious the “purchase price” was a mere fraction of the properties true values.

[25] The trial judge concluded [at paras 26-28]:

“The defendant failed to pay the consideration. It appears that the defendants intended to defeat the payment by never honouring the payment. In my mind, non-payment of the consideration by the defendants is dishonest, clearly imputes fraud and renders the contract invalid.

I therefore concluded that the transfer of the property lacks consideration and is therefore invalid.

The entire transaction is couched in fraud and I therefore conclude that the defendants are not entitled to rely on indefeasibility set out under section 40 of the Land Transfer Act Cap 131.”

[26] In effect the reversal of the transfer depended upon the judge’s finding of fraud. The separate analysis of the issue of consideration boiled down not to consideration, but to fraud.

[27] Defeasibility of the transfer depended on the proof of fraud [sections 39, 40, 41 Land Transfer Act Cap 131]. A whole line of cases has established authority enough for the proposition that fraud is not lightly to be found to cause indefeasibility. It had to be manifest: *Star Amusement Ltd. v Navin Prasad ABU0065 of 2011* [28 September 2012].

[28] In any event, as Lecamwasam JA pointed out in the Court of Appeal:

“The basis of the plaintiff Respondent has been fraud and misrepresentation. The Learned High Court judge rejected this basis and proceeded on the basis of non-payment of consideration, which in her opinion amounted to fraud.” [para 9]

[29] Lecamwasam JA pertinently summarized the plaintiff’s difficulty:

“Indefeasibility of title cannot be attacked on the ground of inadequacy or non-payment of consideration.”

and later:

“Therefore in this case it is not necessary to go into the question of consideration as it is not a ground on which indefeasibility can be defeated.” [para 13]

[30] The plain fact at the trial was that fraud could not be established, nor was it. Consideration was not a relevant factor in this case in seeking to undermine the transfer.

[31] Mr. Naidu framed his petition not relying on the learned judge’s foundations for her decision. He sought to raise the issue as to whether other factors might undermine the indefeasibility provisions of the Land Transfer Act. No authorities were cited showing that such a view has been upheld in other jurisdictions operating the Torrens System.

[32] I conclude there is insufficient merit in this bare proposition as a ground. Additionally it is unlikely to meet the threshold for leave required under section 7(3) of the Supreme Court Act.

Will the ground probably succeed?

[33] I conclude both grounds must fail. However since the delay is not substantial this factor is not as relevant to the current application.

Prejudice to the Respondent

[34] If the time for filing were to be enlarged there would be some prejudice caused to the remaining Respondent. I understand the 1st Respondent still occupies the premises in which they originally resided with the plaintiff. However she is left in a state of limbo not knowing whether the properties are hers or not. She cannot plan easily and she cannot sell the properties until all uncertainty is removed. The uncertainty means any investment in the properties may be money thrown away.

[35] Now the remaining Respondent, the 1st Respondent is a widow and naturally seeks finality from the court. These proceedings commenced in 2006.

Conclusion

[36] The length of delay in proceeding in the Supreme Court is not substantial. There was further delay caused by non-attendance of lawyers for the petitioner in this court. However the failure to file within the time between the Court of Appeal's decision and the Legal Vacation was not explained satisfactorily.

[37] The grounds lack merit. They appear to be without authoritative support for a novel approach to what is a statutory impediment in the path of the petitioner's claim. This area of the law is well settled, and has been so for many years.

[38] I decline the application. There will be costs for the Respondent which I assess summarily at \$1,500.



A handwritten signature in blue ink, appearing to read "A. Gates", is positioned above a dotted line.

Hon. Chief Justice Anthony Gates
President of the Supreme Court

Solicitors for the Petitioner:
Solicitors for the Respondent:

Messrs. Pillai Naidu & Associates
Messrs. Gordon & Company

uln