

**IN THE FAMILY DIVISION OF THE HIGH COURT**

**AT SUVA**

**APPELLATE JURISDICTION**

<b>ACTION NUMBER:</b>	FAMILY APPEAL # 13 OF 2022 (Magistrate's Court File #14/Suv/0585)
<b>BETWEEN:</b>	<b>SIYA</b> <b>APPELLANT</b>
<b>AND:</b>	<b>NEIL</b> <b>RESPONDENT</b>
<b>APPEARANCES:</b>	Mr S. Walli (R Patel Lawyers) for the Appellant Mr R. Naidu & Mr S. Ratoto (Naidu Lawyers) for the Respondent
<b>DATE/PLACE OF JUDGMENT:</b>	Friday 14 July 2023 at Suva
<b>DATE OF HEARING:</b>	Thursday 15 June 2023
<b>CORAM:</b>	Hon. Mr. Justice Chaitanya Lakshman
<b>CATEGORY:</b>	<i>All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.</i>

**JUDGMENT**

1. The Appellant filed an appeal against the ruling of the Learned Magistrate where the Learned Magistrate refused the Appellant leave to appeal out of time. The substantive matter before the Learned Magistrate was in relation to alteration of property interest (Property Distribution).

2. The orders sought by the Appellant in this appeal are as follows:

*“1. An Order allowing the appeal against the decision of the Learned Magistrate delivered on 29<sup>th</sup> September 2022 where she refused to grant leave to appeal out of time and further refused stay.*

*2. An Order granting the Appellant leave to appeal out of time.*

*3. An Order that the Appellant be allowed an enlargement of time to file the Notice of Appeal within 14 days [from] the granting of leave.*

*4. An Order that execution of the Judgment delivered by the Magistrate Court on 29<sup>th</sup> September 2022 be stayed until determination of the appeal.*

*5. That the Respondent pays costs of this Appeal.*

*6. Such further or other order as this Honourable Court may deem just.”*

3. According to Section 19 (1) of the Family Law Act 2003 an appeal from the Family Division of the Magistrate’s Court lies as of right to the Family Division of the High Court. Order 11.01 (a) of the Family Law Rules 2005 provides that an appeal against an order of the Magistrate’s Court must be filed within one month after the day on which the order appealed from was made; or such further time as that court orders. The Magistrate Court has power to grant extension of time to file a notice of appeal outside the prescribed time limit.

4. The Appellant has filed 4 grounds of appeal. This Court will go over each ground of appeal in turn.

**“Ground 1** - *The Learned Magistrate erred in her analysis and decision of the issue of the length of the delay and the reasons in seeking to file an Appeal and failed to properly consider and evaluate the following factors:*

- i. *In her decision delivered on 15<sup>th</sup> November 2021 the learned Magistrate ordered the Respondent to do the following:*

a. *Pay the Appellant an equivalent of 10% of the value of the properties identified in the Pool of Assets including properties already disposed of.*

b. *Pay an amount equivalent to 19% of his shares originally held in Kriz Corporation (Fiji) Limited and Kriz Signane (Fiji) Ltd (99 shares).*

- c. *Pay an amount equivalent to 10% of the value of the vehicle utilised by the Respondent as his own vehicle.*
    - d. *Disclose details of all insurance policies maintained by the Company in the name of the Appellant and Respondent and the maturity date.*
  - ii. *The Respondent failed to do any of the above within 30 days from 15<sup>th</sup> November 2021.*
  - iii. *The Learned Magistrate failed to specify in her judgment a timeline within which the Respondent had to make the payments.*
  - iv. *The fact that the Appellant waited beyond 30 days to file an Appeal as she wished to explore a settlement with the Respondent was a reasonable explanation for the delay in the filing of the application for Leave to Appeal.*
  - v. *There was no prejudice at all to the Respondent in the granting of Leave to Appeal out of Time since he had not taken any steps at all to honour the Orders of the Court.*
  - vi. *The delay was not unreasonable having regard to the factors set out above.”*
5. The principles governing the time limit extensions (granting of leave to appeal out of time) is well settled and well known. They were considered by the Supreme Court in **Native Land Trust Board v Khan [2013 FJSC 1, CBV 2 of 2013, 15<sup>th</sup> March 2013**. The principles of time limit extensions have been applied in the Family matters. The granting of leave to appeal out of time is a matter of discretion. A Court has unfettered discretion. Order 11.01 (b) gives the Magistrate’s Court discretion to extend the time limit for filing of an appeal.
6. The Learned Magistrate in her ruling dealing with leave to appeal out of time identified the correct principles and sequentially dealt with each factor. The length of delay was 40 days and the reasons for the delay in filing the appeal by the Appellant was that she thought that the “Respondent would want a quick settlement and make an offer to settle. He failed to do so.” This Court finds that the matters listed in Grounds 1 (i) (a) to (d) and (ii) of the appeal were not required to be addressed by the Learned Magistrate in her ruling dealing with leave to appeal out of time. The issue before the Learned Magistrate related to the extension of time to appeal being sought by the Appellant. The matters listed in Grounds 1 (i) (a) to (d) and (ii) have nothing to do with the Appellant failing to file the appeal on time.

7. The Appellant is required to give some good and reasonable excuse for the delay. The Appellant was represented all along. If she was dissatisfied with the Magistrate's decision she should have appealed her decision promptly. She should not have waited for the appeal period to expire and then seek to file an appeal after 40 days. The reasons given by the Appellant is not a sound reason for the delay in filing an appeal. The Appellant is basically blaming the Respondent and the Magistrate for the orders made for the delay in filing the appeal. The onus is on the Appellant to satisfy the Court that in all the circumstances the justice of the case requires that she be given an opportunity to challenge the Ruling of the Learned Magistrate. The Appellant has tried to shift the burden and blame the other party and the Court.
8. On the issue of the consequential orders not working. The parties under Section 163 of the Family Law Act 2003 are allowed to seek the setting aside or variation of the orders made under Section 161 of the Family Law Act 2003. These amongst others include situation where a person has defaulted in carrying out an obligation imposed on the person by the order. Mr Naidu is correct in his submission that the Respondent's failure to comply with the consequential orders has nothing to do with the appeal not being filed within time. The Learned Magistrate properly dealt with all the factors in exercising her discretion as to whether leave to extend time to appeal should be granted. She properly analysed all the factors and gave reasons for her decision.
9. This Court would like to highlight the often quoted and referred portion from the Privy Council decision in **Ratnam v. Cumarasamy and Another [1964] 3 All E.R.** at page 935; (Lord Guest in giving the opinion of the Board to the Head of Malaysia):
- “The rules of Court must, prima facie, be obeyed, and, in order to justify a Court in extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of the litigation.”*
10. Extension of time to appeal is a request to the Court. The Court must be satisfied that there is an honest and acceptable explanation for the reasons for the delay. 40 days is a

substantial period of time. Time limits are prescribed for a reason and the Court has discretion to extend those limits only for just and fair reasons. In **Avery v No 2 Public Service Appeal Board [1973] 2 NZLR 86 (CA)**, Richmond J said (at P. 91):

*“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 an indulgence by the Court. The onus rests on him to satisfy that in all the circumstances the justice of the case requires that he be given the opportunity to attack the judgment from which he wishes to appeal.”*

Richmond J went on to emphasise that the discretion was wide and said (at P.92):

*“In order to determine the justice of any particular case the Court should I think have regard to the whole history of the matter, including the conduct of the parties, the nature of the litigation and the need of the applicant on the one hand for leave to be granted together with the effect which the granting of leave would have on the other persons involved.”*

11. This Court finds that the Appellant did not give a reasonable explanation for non-compliance with the Rules. The Appellant was represented. It should not have taken the Appellant and her lawyers long to decide whether they wanted to appeal. The reasons advanced by the Appellant are not satisfactory. The Learned Magistrate quite correctly rejected them.
12. The second ground of appeal is “... The Learned Magistrate erred in fact and in law in her decision that the following grounds of appeal had no merit or that the Higher Court would unlikely interfere with the discretion of the lower Court:

**Ground 1**

*The Learned Magistrate of the Family Division erred in fact in law adjusting the shares in commercial properties from 50% to 20%.*

*That the adjustment of 30 % was unjustified and no proper reasons were provided for such downward an adjustment.*

**Ground 2**

*The Learned Magistrate took into account irrelevant factors in making the downward adjustment by 30%.*

**Ground 3**

*The Learned Registrar erred in fact and in law in reducing the final share of the Appellant from 20% to 10%.*

**Ground 4**

*The Learned Magistrate failed to take into account relevant factors in making the adjustment.*

**Ground 5**

*The Learned Magistrate gave unreasonable weight to the factors of the Respondent's alleged bad health and to the infancy of his children in making the downward adjustment from 20% to 10%."*

13. It is well established that for an application for leave to appeal out of time to succeed the Applicant needs to establish that the appeal has merits and will probably succeed. In **Bharat Kumar Narsey v The Attorney General of Fiji and Another [2012] 1 FLR 403 (5 April 2012)**, Justice Calanchini AP observed: "*In my judgment where there is a short delay in making an application and where that short delay is fully and satisfactorily explained, then the Court's discretion is unlikely to be exercised on the side of refusing an extension of time, unless an extreme lack of merit justifies such a refusal. However where the delay is much longer and where the explanation for the delay is not wholly excusable, then the Applicant will need to establish much more merit for the court to exercise the discretionary balance in his favour. (See Norwich & Peterborough Building Society v Steed [1991] 2 All ER 880)*".

14. The Learned Magistrate in her Ruling on the Property Division on 15<sup>th</sup> November 2021 identified the property that was part of the distribution, considered the valuation of the properties, contribution of the parties (financial, non-financial contribution and contribution of the parties towards the welfare of the family) and the other important

factors. The Learned Magistrate gave reasons for her adjustments of the Appellant's entitlement. She found “...*non-financial contribution on the part of the lady cannot be ignored. She also looked after her father in law when he became bed ridden.*” and “...*This Court finds that whilst the lady has contributed non-financially towards the relationship, the business and the family and has also contributed towards the welfare of the family, the presumption of equal contribution cannot be sustained in law and in fact. This Court finds it is the man's knowledge skill and effort in the industry which led to the accumulation of the wealth and current status of the man.*”

15. The Learned Magistrate took into account Section 162 of the Family Law Act 2003 in her decision. These were the relevant factors. The Appellant has not identified the irrelevant factors which they refer to in their grounds of appeal in the downward adjustment. The Appellant needed to be precise as to what were the irrelevant factors that was considered by the Magistrate. The adjustments made under the head of “future needs” brought down the percentage from 20% to 10%. In analysing this part the Learned Magistrate did not take irrelevant factors into consideration. She gave reasons for her decision and correctly considered Section 162 (3) of the Family Law Act 2003.

16. The Appellants in their submission have stated that “the starting presumption was that each party would be entitled to receive 50% of the communal property”. This position of the Appellant is misconceived. The relevant Section is Section 162 (2) of the Family Law Act 2003 which provides that “*for the purposes of subsection (1) the contribution of the parties to a marriage is presumed to be equal, but the presumption may be rebutted if a court considers a finding of equal contribution is on the facts of the case repugnant to justice, (for example as a marriage of short duration).*” This Section is clear that the presumption may be rebutted if a Court considers a finding of equal contribution is on the facts of the case repugnant to justice. In this matter the Learned Magistrate found that it was repugnant to justice and hence her decision in not finding equality.

17. The third ground of appeal is that “*The Learned Magistrate erred in fact and in law in holding that since the proposed grounds of appeal in the substantive appeal were matters of fact rather than law the Appellate Court would not likely interfere with the analysis of the evidence by the Original Court. In making such a Ruling the Learned Magistrate failed to consider the fact that the Appellate Court was entitled to consider the inferences that had been drawn by the lower Court from the facts and evidence before the Court as well as*

*the application of established tests, reasoning and analysis attached to the finding of facts.”*

18. The third ground deals with the issue of merits of the appeal which the Learned Magistrate analysed while dealing with the issue of extension of time. She did not dismiss it as only matters of fact rather than law. Having perused the Ruling of the Learned Magistrate this Court finds that the Magistrate applied the correct law and analysed the evidence that was put before her. She gave reasons for her findings. Section 161 of the Family Law Act 2003 gives the trial Court (Magistrate) extensive powers and broad discretion. In adjusting shares in the commercial properties from 50% to 20% the Learned Magistrate gave reasons and took into consideration various factors which she outlined in her Ruling. In making the 30% adjustment the Learned Magistrate gave reasons. The calculations that the Learned Magistrate made are supported by reasoning. She considered each parties contributions including the post-separation period. Then she reached her conclusions.
19. The fourth ground of appeal is that *“The Learned Magistrate erred in fact and in law in holding that the Respondent would suffer prejudice if the Court granted leave to appeal out of time when in fact the Respondent had failed to show how he suffered any type of prejudice especially since the Respondent had completely failed to honour any of the Orders made by the Court within 30 days period or with the period leading up to the filing of the Application for Leave to Appeal out of Time.”* On this ground which is prejudice. The Learned Magistrate considered the relevant case authorities. The matter had been pending in Court since 2014. The Respondents health and personal circumstances were considered. The Learned Magistrate found that the Appellant had adequate time to instruct her lawyers as to the appeal. The Appellant for her part wanted quick settlement. At the hearing the Lawyer for the Appellant informed this Court that if the settlement took place there would not have been an appeal. It is trite law that litigation must have finality and that the successful litigants are entitled to the fruits of the litigation. The Appellant was happy to have the settlement take place following the property distribution Ruling. She did not promptly appeal the Ruling of the Magistrate.
20. In relation to this appeal there are certain issues which this Court would like to highlight. The issues relate to the drafting of the grounds of appeal and the accuracy of the contents. The first issue is the drafting of the grounds of appeal. The Appellate Courts have time and



again emphasised that the grounds of appeal must reflect the precise points to be argued. The grounds of appeal are imprecise. The vagueness of the grounds of appeal cannot be ignored. The other issue is incorrect reference to a position or a Court. In the grounds of appeal reference is made to the Registrar instead of Magistrate, and Magistrate Court as Employment Court. Lawyers must ensure that correct reference is made. They need to be precise when they draft the grounds of appeal. It will help everyone understand the issues on appeal.

21. For the reasons given here given herein and having found that there is no merit in any of the grounds of appeal. The orders sought in this appeal are dismissed. The Appeal is dismissed. Each party is to bear their own costs of this appeal.

### **Court Orders**

- (i) The Appeal is dismissed.
- (ii) Each party to bear its own costs.

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Chaitanya Lakshman

**Acting Puisne Judge**

**14<sup>th</sup> July 2023**