

IN THE HIGH COURT OF FIJI
AT SUVA
PROBATE JURISDICTION

Civil Action No.: HPP 36 of 2017

BETWEEN : **SHIREEN NITA NARSAIYA** and **JOSEPH EMMANUEL NARSAIYA** of 1/34 Ferguson Avenue, Wiley Park, NSW Australia and Lot 156 Matanikorovatu Road, Makoi, Nasinu as the Executors and Trustees of the **ESTATE OF RUTH LILA WATI NAISAIYA** aka **RUTH NARSAIYA**.

PLAINTIFF

AND : **JOASH HERALD PRAKASH NARSAIYA** Lot 156 Matanikorovatu Road, Makoi, Nasinu.

DEFENDANT

Counsel : Ms. Naidu S. for the Applicant
Mr. Singh K. for the Defendant
Date of Hearing : 30th October, 2017
Date of Ruling : 1st November, 2017

RULING

INTRODUCTION

1. The Defendant by way of Inter-Parte Notice of Motion sought to file an Affidavit in Opposition out of time, in the Originating Summons seeking certain orders regarding a property belonging to an estate of a deceased. The Plaintiff, the Defendant and also another party are the sole beneficiaries of the said property. The application is for a private sale of the said property by the executors of the estate and vacant possession of the same. At the moment Plaintiff and Defendant lives on the said property. Initially when the matter was called before Master the Defendant did not file an affidavit in opposition though he was served with the Originating Summons and an acknowledgment was not filed within stipulated time. No affidavit in opposition was filed within time, too. When the matter was referred to me for hearing the Defendant had filed an affidavit in opposition. The Plaintiff objected to the said affidavit on the basis that it was filed out of

time. The present application is for seeking leave of the court to file and serve an affidavit in opposition by the Defendant.

ANALYSIS

2. The High Court Rules of 1988, Order 3 Rule 4 deals with extension of time and states as

'(1) The Court may, 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 under after the expiration of that period.

(3) The period within which a person is required by these Rules, or by an 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 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 of all of the same be waived."]

3. When the matter was to be listed for hearing the Defendant had filed an affidavit in opposition without seeking leave of the court. If no objection was made, directions for reply would have given and the matter would have been fixed for hearing.

4. First Issue is whether there is delay and if so what is the length of delay.

5. The time for filing of an affidavit in opposition for the Originating Summons is contained in Order 28 rule 2 (4) and state as follows

'(4) Where a defendant who has acknowledged service wishes to adduce affidavit evidence he must within 28 days after service on him of copies of

the plaintiff's affidavit evidence under paragraph (3) file his own affidavit evidence with the Registry and serve copies thereof on the plaintiff and on any other defendant who is affected thereby.'

6. According to the affidavit of service the Originating Summons was served to the Defendant on 18th July, 2017.
7. The Appointment of Solicitor was filed on 27th September, 2017 and an affidavit in opposition was also filed on the 28th September, 2017.
8. There is a delay of about 6 weeks for the said filing of the affidavit in opposition.
9. In terms of Order 12 rule 5(2) acknowledgment of service can be done even after time stipulated for that, but such late acknowledgement shall not be *ipso facto* extend the time for doing a certain action that should have done if the acknowledgment was filed without a delay. The acknowledgment of solicitor for the Defendant was done late, but it is accepted under Order 12 rule 5(2).
10. The length of delay is not excessive but there should be a reason for delay. In the affidavit in support of this application the Defendant states that the delay was because he was trying to obtain a Solicitor to represent him and the requirement for funds for that purpose.
11. Fiji Court of Appeal in *Kuar v Sharma* [2016] FJCA 105; ABU84.2014 (9 August 2016) Chandra JA stated that 'However, the excusable delay alone does not guarantee the success of an application for extension of time. In *Tevita Fa v Tradewind Marine Ltd and Another* ABU 40 of 1994 (18 November 1994) Thompson JA stated:
"As important as the need for a satisfactory explanation of the lateness is the need for the applicant to show that he has a reasonable chance of success if time is extended and the appeal proceeds."
12. The Defendant is significantly disputing the valuation of the Plaintiff and the manner in which a buyer was selected for the sale of the property. Apart from that Defendant had

raised some legal objections regarding the mode of application and also whether an application for vacant possession could be coupled with the orders sought in the Originating Summons.

13. Considering the length of delay and explanation and also merits of the objection I will grant extension of time of 3 days to file affidavit in opposition subject to payment of cost of \$150 within 7 days. If the cost is not paid within time affidavit in opposition is deemed struck off.

FINAL ORDERS

- a. The Defendant is granted 3 days from today to file and serve an affidavit in opposition, subject to payment of \$150 within 7 days from today.
- b. If the cost is not paid within stipulated time affidavit in opposition is deemed struck off.
- c. The Plaintiff is granted 7 days from the service of the affidavit in opposition to file and serve the affidavit in reply.

Dated at Suva this 1st day of November, 2017.



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Justice Deepthi Amaratunga
High Court, Suva