

an Order that the Hearing of the substantive matter be reopened such that the Defendant be allowed to present his case.

- [2] The substantive matter to which this Notice of Motion relates is where the Plaintiff, **VIKASH CHANDRA**, filed on 29 March 2006 an Amended Writ of Summons and Amended Statement of Claim seeking (amongst other matters) that the Court pronounce against a Will propounded by the Defendant as the last Will of **PARVATIAMMMA CHANDRA** purportedly executed on 6 of January 2003 and for an Order that Probate in the **ESTATE OF PARVATIAMMMA CHANDRA** be granted in accordance with the last and true Will of **PARVATIAMMMA CHANDRA** dated 6 December 2002.
- [3] The substantive matter began in the High Court at Suva in 2003 and Orders were made by this Court on 30 November 2004 and 16 March 2006 in an attempt to bring the matter to hearing which was eventually set down before me on 3 November 2008.
- [4] The hearing began on 3 November 2008 with the Plaintiff presenting his case. It continued the following morning, 4 November 2008, with the Plaintiff being cross-examined by the Defendant. There was no re-examination. Counsel for the Plaintiff then closed his case.
- [5] When the Defendant, who was self-represented, was invited by the Court to open his case, the Defendant informed the Court that he had a “need to rest” was “not feeling well” and, apart from himself, he had two other witnesses he would be calling. The request was consented to by Counsel for the Plaintiff and the Court advised the Defendant to go and see a doctor and to bring a medical certificate with him tomorrow noting that “the matter is adjourned by consent until 10am tomorrow 5 November 2008”.
- [6] When the matter was called at 10 am on the following day, 5 November 2008, the Defendant was not in attendance. There was, however, a **Mr MONIT DASS**, the latter being one of the Defendant’s witnesses but who advised the Court that his son was having surgery in Lautoka at 8am the next day and he needed to leave Suva by 11am that day.

- [7] There was also in attendance a **Mr DAMODAR PRASAD** another of the Defendant's witnesses who advised that he had spoken with the Defendant by telephone at 9am that morning and the Defendant had told him that he was coming to Court. **Mr PRASAD** then, at the request of the Court, supplied the home telephone number of the Defendant and the Court Staff were asked to try and contact the Defendant on that number.
- [8] Meanwhile, the Court was advised that a medical certificate had been left by the Defendant at 9am that morning with the staff of the Civil Registry of the High Court at Suva requesting it to be passed on to the Court even though the Defendant had been allegedly advised that he needed to appear before the Court in person and present the said medical certificate.
- [9] I note the following in relation to the said medical certificate left by the Defendant with the staff of the Civil Registry of the High Court at Suva on 5 November 2008:
- (a) That it was issued at the "CWM" Hospital;
 - (b) That it was dated 4 November 2008;
 - (c) That it was signed by a "medical officer" whose name I cannot decipher;
 - (d) That it stated that the Defendant "is suffering from Chest Infection/Stress" was being treated as an outpatient and "will be reviewed on 07/11/08";
 - (e) That it did not state that the Defendant was unfit to attend Court.
- [10] The Defendant also wrote a letter to the Court dated 5 November 2008 which he also left with the staff of the Civil Registry of the High Court at Suva stating that he was on the following "prescription medications":
- (a) Salbutamol – one three times a day (for short breath);
 - (b) Amoxicillin – one every eight hours (antibioatic [sic]);
 - (c) Multivitimin [sic] – one three times a day;
 - (d) Promethazine – one at night (Sleeping pills).

The Defendant also advised that: "*I am already on SPRAY 'Spiriva' (from Australia prescription)*".

- [11] In addition, in his letter to the Court dated 5 November 2008, the Defendant advised:
“I am for review on Friday 7th November, 2008”.
- [12] The Court was advised at 10.30am by the Court staff that they had tried three times by telephone to call the Defendant on the home telephone number supplied but there had been no answer. There was also in attendance at Court a person by the name of **“KITI”** who advised the Court that he was the “driver” for the Defendant’s other son and had been asked to pick up the Defendant that morning and bring him to Court but had to drop him back home because the Defendant wasn’t feeling well and that he “did not think he will be coming”.
- [13] After the Court heard from both Counsel for the Plaintiff as well as the member of the Civil Court Registry staff with whom the Defendant had left his documents, the Court took the view that in the circumstances, the Defendant was not here to pursue his case and orders would now be made simply for the filing of written submissions by both parties. The Court also noted that Counsel for the Plaintiff as well as the Court Registry were to advise the Defendant of these orders.

2. The inter-parte Notice of Motion

- [14] On 24 November 2008, the Defendant then filed through a Solicitor an Inter-Parte Notice of Motion seeking, in effect, dismissal of the Order made on 5 November 2008 and that he be allowed to continue with the hearing of his case.
- [15] In support of the Notice of Motion, the Applicant Defendant relied upon the grounds set forth in his Affidavit sworn and filed on 24 November 2008 which, in effect, restates much of the matters already set out above.
- [16] The Respondent Plaintiff filed on 16 December 2008 an Affidavit sworn on 11 December 2008 in opposition to the Motion which also, in effect, restates much of the matters already set out above.

[17] Counsel for the Applicant Defendant filed on 21 January 2009 written submissions which were only provided to Counsel for the Respondent Plaintiff at the hearing on the morning on 22 January 2009. The matter was then stood down until later that day for Counsel for the Applicant Defendant to consider these submissions at which time he indicated that he wished to proceed that day rather than seek a short adjournment.

[18] At the hearing Counsel for the Applicant Plaintiff spoke to his written submissions restating much of the matters already set out above as well as:

(a) That the Applicant was in effect seeking constitutional redress seeking a stay of the Orders of 5 November 2008 to finalise the case by way of written submissions as by the Applicant not being allowed to present his case through adducing oral evidence was an actual or likely breach of the Applicant's rights under Sections 29(1) and (6) of the *Constitution of the Republic of the Fiji Islands 1997*;

(b) That the High Court has power to stay proceedings in order to secure fair treatment for those alleged of committing a crime (and in this case fraud is alleged) and a number of cases were cited in support.

[19] Counsel for the Respondent Defendant submitted in response much of the matters already set out above noting that he was not relying upon case law but simply "*The rules and pure facts*".

B. THE LAW

1. The Constitution

[20] Sections 29 (2) and (6) of the *Constitution of the Republic of the Fiji Islands 1997* state:

"Access to courts or tribunals

...

(2) Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate, by an independent and impartial tribunal.

...

(6) Every person charged with an offence, every party to civil proceedings and every witness in criminal or civil proceedings has the right to give evidence and to be questioned in a language that he or she understands. [My emphasis]

2. The High Court Rules

[21] Order 35 rule 1(2) of the High Court Rules states:

“Failure to appear by both parties or one of them
1...(2) If, when the trial of an action is called on, one party does not appear, the judge may proceed with the trial of the action or any counterclaim in the absence of that party.

[22] Further, Order 35 rule 2 of the High Court Rules states:

“Judgment, etc. given in absence of party may be set aside
“2 (1) Any judgment, order or verdict obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just.
*(2) An application under this rule **must** be made within 7 days after the trial.”*
 [My emphasis]

[23] In addition, Order 45 rule 10 of the High Court Rules provides as follows:

“(10) Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of judgment or Order, and the court may by Order grant such relief, and in such terms, as it thinks just.” [My emphasis]

3. Case law

[24] In ***Rao v Goundar*** (1998 44 FLR 82 (Paclii: [1998] FJHC 72, High Court of Fiji, Civil Action No. HBC 308D of 1996S, 22 May 1998, Pathik J, <http://www.paclii.org/fj/cases/FJHC/1998/72.html>), the Court reinstated an action with costs after the Plaintiff’s Counsel failed to appear at the hearing when “double-booked”.

[25] In ***Tonu'hae v NBF Asset Management Bank*** (Unreported, High Court of Fiji, Civil Action No. HBC 588 of 1998, 12 July 2005, Singh J; Paclii: [2005] FJHC 178, <http://www.paclii.org/fj/cases/FJHC/2005/178.html>), the Court reinstated an action with costs so damages could be decided where the Plaintiff had failed to appear at the strike

out application but on affidavit in support of the application for reinstatement was able to provide details as to the whereabouts of various witnesses.

[26] In *Ahmed v Ligairi* (Unreported, High Court of Fiji, Civil Action No.HBC 100 of 2003, 25 July 2005, Winter J; Paclii: [2005] FJHC 270, <http://www.paclii.org/fj/cases/FJHC/2005/270.html>), the Court granted an adjournment for the Plaintiff due to family illness noting that “there is ample precedent available for a consideration of family illness as a reason for setting aside a fixture” but ordered costs against the Plaintiff applicant in respect of expenses incurred by the Defendant noting that the matter was not ready for hearing.

[27] The question as to “the exercise of judicial discretion in refusing an adjournment” was considered recently by the Fiji Court of Appeal in *Goldenwest Enterprises Ltd v Pautogo* (Unreported, Civil Appeal No.ABU0038.2005, 3 March 2008, Byrne and Scutt JJA ; Paclii: [2008] FJCA 3, <http://www.paclii.org/fj/cases/FJCA/2008/3.html>), where the Court noted at paragraph 29:

“It is a principle, universally applied, that the power to adjourn or refuse to adjourn a proceeding is within the discretion of the Court hearing the matter. It is further universally accepted that an appeals court should be loath to overturn the trial court’s exercise of discretion as to the grant of an adjournment or its refusal, except upon good reason.” [My emphasis]

[28] As to the test to be applied, the Court of Appeal noted in *Goldenwest* at paragraphs 38-42:

“38. An objecting party is compensated by costs – unless the adjournment would cause irreparable damage to it. Then a court must weigh up the competing interests and consequences ruling according to the fairness and justice of the particular case.

39. Counsel for [Goldenwest] also drew the Court’s attention to Dick v Piller [1943] 1 All ER 627 where in a part-heard matter, Counsel for one of the parties applied for a further adjournment on grounds that the Defendant’s evidence ‘was essential for the proper determination of the case’, however he ‘was too ill to attend’. There was no objection from the Plaintiff’s Counsel and a medical certificate was provided together with an assurance from Counsel that an Affidavit from the medical practitioner could be obtained that day. The adjournment application was refused. No Affidavit was produced, and a refusal to

adjourn met a fresh application made at the conclusion of the Plaintiff's case.

40. The appeal court agreed that the Defendant had been deprived of a fair hearing ...

41. In Dick v Piller in issue was whether the appeal was on a point of law or fact. It was a question of law, said the Court, for by refusing the adjournment the judge 'caused a serious miscarriage of justice, and ..., in doing so, rejected the first principle of law, for he deprived the defendant of his very right to be heard before he was condemned': at 628

42. There is, however, a requirement that there be no 'fault' on the part of the party seeking the adjournment: Piggott Construction v. United Brotherhood (1974) 39 DLR (3d) 311 (Sask. CA) [My emphasis]

[29] Thus the Court of Appeal concluded in Goldenwest at paragraphs 51 and 54-55:

*" ... This Court has every sympathy with the wish of trial courts to maintain a tight rein on proceedings and to ensure expeditious hearings. This is particularly so if a trial date has been set, or if the history of a matter reveals a litany of delays particularly caused through adjournments ... The Court is aware that in too many instances adjournments are or may be sought as a matter of course and that due to the Court's schedule and a mounting number of cases, adjournments may too readily be gained. It is understandable that as an antidote to this, a Court may ultimately be loath to grant an adjournment where otherwise a trial is ready to proceed and the Court has set a firm date after a number of adjournments. **At the same time, Courts must be careful to ensure that all the circumstances must be borne in mind and that ultimately expedition is not the sole measure. Justice and fairness are essential features of the consideration for a request for an adjournment ...***

54. In all the circumstances, it appears that the exercise of discretion not to grant an adjournment on the day of the hearing to enable the giving of evidence and provision of instructions ... was unfair and unjust in its denial to Goldenwest of its right to be heard, and procedural fairness generally.

55. To remedy this wrong, Goldenwest should be provided with the opportunity it was denied by the denial of an adjournment ..." [My emphasis]

C. FINDINGS

1. The Constitution

[30] Whilst Sections 29 (2) and (6) of the *Constitution* concerning the rights of access to a Court including a right to determination by a Court and the right to give evidence, the application currently before the Court is not one of access to the courts in the first

instance but rather the re-opening of proceedings to allow the Defendant to present his case after an order was made for the filing of written submissions following the non-appearance of the Defendant allegedly due to illness but without the consent of the Court.

- [31] The Court finds, however, that in particular, Section 29 (6) concerning the right of the Defendant and his two witnesses to give evidence must be taken into account by the Court even though there is some force in the argument of Counsel for the Respondent Plaintiff that the Applicant Defendant was given that right but failed to appear at Court when given that opportunity.

2. The High Court Rules

- [32] As for the High Court Rules, Order 35 rule 2 is clear that “*An application under this rule **must** be made **within 7 days** after the trial.*” The Orders of the Court were made on 5 November 2008 (and of which the Applicant was served that same day as arranged by Counsel for the Respondent Plaintiff (even if the Court sent its notification initially to the wrong PO Box number).
- [33] This meant that the Notice of Motion which was not filed until 24 November 2008 (some 19 days after the Orders were made) was 12 days out of time.
- [34] To be fair, it should be noted that the Applicant wrote to the Court on 17 November 2008 expressing his objection (5 days out of time) and commenced instructing his present Counsel on 18 November 2008 when the Plaintiff’s closing submissions were filed and served upon him.
- [35] The Court of Appeal in a number of recent cases has highlighted that it expected time limits to be observed: see *Momoivalu v Telecom Fiji Limited* (Unreported, Fiji Court of Appeal, Civil Appeal No.ABU0037 of 2006, 7 September 2007, Byrne, Pathik and Mataitoga JJA). This was reinforced in *Raj v Shell Fiji Limited* (Unreported, Fiji Court of Appeal, Civil Appeal No.ABU0039 of 2007S, 9 May 2008, Bryne and Hickie JJA);

and *Shah v Fiji Islands Revenue and Customs Authority and 2 Ors* (Unreported, Court of Appeal, ABU0001 of 2007, 4 July 2008, Byrne, Pathik and Hickie JJA),

- [36] I am mindful, however, of the recent decision of the Supreme Court of Fiji in *Pacific Agencies (Fiji) Ltd v Spurling* (Unreported, Supreme Court of Fiji, Civil Appeal No.CBV0007 of 2008S, 17 October 2008, Mason, Handley and Weinberg JJSC) ; Paclii: [2008] FJSC 27, <http://www.paclii.org/fj/cases/FJSC/2008/27.html>) wherein the Court overruled the Court of Appeal’s judgment in *Raj v Shell* as to when time actually “runs” for the filing of appeals to the Court of Appeal from judgments of the High Court.
- [37] The Supreme Court’s decision in *Pacific Agencies*, however, does not affect the basic principle that time limits must be observed. Indeed, the Supreme Court in *Pacific Agencies* did refer to Order 42 rule 5 (2) of the High Court Rules which outlines Orders which “need not be drawn up unless the Court otherwise directs”.
- [38] In the present case, the Order made on 5 November 2008 was a timetable for the parties to file and serve their respective written submissions. I am of the view that it is covered by Order 42 rule 5 (2)(a)(ii), that is, “an Order which grants leave for the doing of any of the acts mentioned in paragraph (3)” which, in turn, includes at (3)(c) the act of “the filing of any documents”. In short, time “ran” from the 5 November 2008 when the Applicant was served that same day as arranged by Counsel for the Respondent.

3. Factors for consideration in whether to grant the application

- [39] The factors which the Court should take into account in considering the Applicant’s application are:
- (a) the **length** of the delay;
 - (b) the **reasons** for the delay;
 - (c) whether the *objecting party can be compensated sufficiently by an award of costs or would it cause irreparable damage to them*.
- [40] Taking each of these factors in turn, the Court finds as follows:

(a) the **length** of the delay – it was on one view not until 24 November 2008 some 19 days after the Orders of the Court were made on 5 November 2008, but, on another, the Applicant wrote to the Court on 17 November 2008, some 12 days late and just before the first set of written submissions from the Plaintiff were due to be filed and served.

(b) the **reasons** for the delay – as set out early in this judgment, the Applicant took ill on the second day of the hearing, thought he would be well enough for the next day but still felt ill and went home. Even though the medical certificate dated Tuesday 4 November 2008 is slight, it did say of the Applicant “*He ... will be reviewed on 7/11/08*”, that is, the following Friday, so he did have, in effect, a medical certificate sufficient to cover an adjournment –the problem being he did not properly communicate this to the Court nor even his witnesses.

(c) whether the ***objecting party can be compensated sufficiently by an award of costs or would it cause irreparable damage to them*** – the Respondent has not pointed to any irreparable damage they would suffer if the Orders of the 5 November 2008 were vacated and the Defendant was allowed to continue with his case. In addition, although the Applicant through his Counsel repeatedly refused to make any compensation to the Respondent for the day’s legal fees incurred, it is clear that the “*objecting party can be compensated sufficiently by an award of costs*” for the lost day in legal fees incurred for Wednesday, 5 November 2008. Even though the Applicant was ill, it was because he did not properly inform the Court, Counsel for the Respondent, as well as his own witnesses, that all others involved with the case were present waiting for the matter to proceed on 5 November 2008. Indeed, even his witnesses were unsure as to what was happening. Hence Orders were made in his absence for the filing of written submissions and it was directed that he be so advised by both Counsel for the Respondent as well as the Court Registry.

[41] Having considered the above factors, the Court finds that the Applicant has satisfied the relevant criteria to allow his Application. In doing so, I am also mindful of what the Court of Appeal noted in **Goldenwest**, that:

“the result of the order to refuse the adjournment would be to defeat the rights of the affected party altogether and to cause an injustice to one or other of the parties: Sookdeo v. Ali and Ali Ct App. Rep. Trinidad & Tobago, 2001 (18 May 2001), at 2”

[42] In addition, to compensate the Respondent, the Applicant is to pay the costs of the hearing day “thrown away”, that is, Wednesday, 5 November 2008.

[43] **The Court orders as follows:**

- 1. That the Applicant Defendant’s Notice of Motion filed on 24 November 2008 seeking to continue with the hearing of the substantive application (that is, the Applicant’s Defence to the Respondent’s Amended Writ of Summons and Amended Statement of Claim), is granted.**
- 2. That the Orders of 5 November 2008 are vacated and the matter is adjourned on a part-heard basis for mention before me at 8.30am on 27 February 2009, for allocation of a further date to continue with the hearing of the said substantive application.**
- 3. That the Applicant Defendant is to pay the costs of the adjournment of Wednesday, 5 November 2008, on a party-party basis which if not agreed between the parties by 4pm on 25 February 2009 then as determined by the Court at 8.30am on 27 February 2009.**
- 4. That each party are responsible for their respective costs incurred in relation to the hearing of this Motion.**

Thomas V Hickie

Judge

Solicitors:

**Vakaloloma & Associates, Barristers & Solicitors, Suva
Mehboob Raza & Associates, Barristers & Solicitors, Suva**