IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0038 OF 1997
(Appeal from High Court Civil Action No. HBC0233 of 1993/L)

BETWEEN:

NATIVE LAND TRUST BOARD

Appellant

- and -

1. DHAN KAUR (d/o Issar Singh)
2. JOGENDAR KARAM SINGH
   (s/o Karam Singh)

Respondents

Vuataki Prasad & Associates for the Appellant
Mishra Prakash & Associates for 1st and 2nd Respondents

DECISION
(Chamber application for leave to appeal out of time)

Nature of application

This is an application for leave to appeal out of time against a decision of Lyons J given in Lautoka High Court on 18 April 1997. It was filed on 16 July 1997. If leave to appeal is granted the Appellant seeks further leave to adduce evidence to establish that the default judgment entered against it was irregular in that it was for an unliquidated sum. The Appellant has also given notice that if its application to enlarge time is granted it will then ask for stay of execution of the judgment.

Parties involved

The parties named in the writ in the Court below were as follows -

BETWEEN DHAN KAUR daughter of Issar Singh of California, United States of America, presently of Votualailai, Sigatoka, Fiji, engaged in domestic duties, trustee of the ESTATE OF KARAM SINGH.

FIRST PLAINTIFF

A N D JOGENDAR KARAM SINGH son of Karam Singh of Varadoli, Ba, Fiji, Travel Agent.

SECOND PLAINTIFF

A N D TEVITA MARA VITUKAWALU Head of Mataqali of Navua, Fiji, Drainage and Irrigation Board Officer in his own right and as representative for and on behalf of Mataqali Ketenatukani, of Vunibau, Serua and ALIPATE NATOBA VITUKAWALU Market Master, Lautoka City, in his own right and as representative for and on behalf of Mataqali Ketenatukani, of Vunibau, Serua

FIRST DEFENDANTS

A N D ATTORNEY GENERAL OF FIJI of Fiji as the Legal representatives of the Fiji Military Forces.

SECOND DEFENDANT

A N D NATIVE LAND TRUST BOARD a body constituted under the Native Land Trust Act Cap. 134 Laws of Fiji of Lautoka, Fiji.

THIRD DEFENDANT

The proposed Appellant in this matter is the Native Land Trust Board (NLTB) the Original 3rd Defendant and the st1 and nd2 Respondents were respectively the Original 1st and 2nd Plaintiffs in the Court below.

Section 4(1) of the Native Land Trust Act Cap. 134 vests the administration and control of all native land in the NLTB for the benefit of the Fijian owners.

Chronology of events

The chronology of events relevant to this application is as follows -

(i) 23/7/93 - Writ issued at High Court in Lautoka based on trespass and conversion. The chattels and properties allegedly converted were individually assigned monetary value totalling $318,040.00.

(ii) 15/2/94 - Judgment entered against the 3rd Defendant for $318,040.00 in default of filing any defence.

(iii) On 23 February 1997 Respondents entered interlocutory judgment against the 1st Defendants as they had not entered appearance or acknowedged service; the judgment being for "damages and interest to be assessed and costs".

(iv) 10 June 1994 - Respondents obtained Garnishee Order against the Appellant in the High Court to satisfy the judgment debt for monies owing by the Appellant to the 1st Defendants named in the writ.

(v) On 19/5/95 the Appellant moved the Court to (i) stay execution of the judgment, (ii) set aside the judgment and (iii) for leave to file and serve Statement of Defence. The application was made under Order 13 Rule 10 of Rules of the High Court.

(vi) 9 February 1996 - Appellant's application to set aside judgment dismissed by Lyons J.

(vii) On 16/9/96 - A writ of Fifa was issued against the Appellant.

(viii) On 12/11/1996 - Fresh summons filed by the Appellant (i) to set aside judgment, (ii) for leave to file defence out of time and (iii) for a stay order against the Garnishee and Fifa proceedings.

(ix) On 18 April 1997 Lyons J. dismissed the 2nd application also.

(x) On 24 April 1997 Lyons J.'s decision was sealed.

(xi) On 11 July 1997 the Appellant filed a 3rd application to (i) stay execution of judgment, (ii) set aside default judgment and (iii) set aside the Garnishee Order.

(xii) On 16 July the Appellant filed a motion in the Court of Appeal for leave to appeal out of time and leave to adduce further evidence if time is extended.

The matter first came before me on 24 July 1997. It was adjourned to 9 September 1997 at the request of the Appellant's Counsel who indicated that there was prospect of settlement. However on the adjourned date I was advised that no settlement had been reached. Counsel for each side has filed written submissions and the parties have also filed affidavits in support of their respective case. Both Counsel agreed that a decision may be given on the basis of documents filed without hearing oral arguments.

The Respondents strongly oppose this application.

Appellant's case

It is the Appellant's contention that the delay is small, it has been reasonably explained and that no prejudice will be caused to the Respondents if time to appeal is extended. Furthermore they argue that they have good prospect of success and that they would suffer an injustice if leave is not granted.

In support of their arguments they basically reply on the affidavit of Tevita Rabuli, their Divisional Estate Manager in the Western Division.

re Length of delay and the reasons therefor

It will be noticed that the application for leave to appeal out of time was filed almost 3 months after decision was given although time to appeal did not expire until 6 weeks after the decision was sealed on 24 April 1997.

In the light of past delays and defaults one would have thought that the Appellant would have taken immediate steps to file an appeal if it was aggrieved. This it failed to do. As far as reasons for delay in this application and delays generally are concerned I have considered all relevant paragraphs of Tevita Rabuli's affidavit and in particular paragraphs 3, 4, 5, 6 and 9 which read as follows -

> *'3. THE Applicant filed acknowledgment of Service on 17th day of September, 1993 and due to the Applicant's Solicitor leaving Applicant's employ to go into private practise the defence was not attended to and default judgment entered as the Applicant's file was in the Lautoka Office with no resident Solicitor attending to it.*

4. THE Solicitor who came to relieve at our Lautoka Office had only commenced practice for a few months after joining the Fiji Bar and applied to set aside judgment using a Motion instead of a Summons and used the wrong rule to set aside.

5. WE then engaged a Barrister from Suva who applied to set aside default judgment and stay execution who used a Summons and Order 19 Rule 9 of the High Court Rules and the honourable Court at first instance in a decision dated 18th day of April, 1997 refused to set aside for non compliance of Order 2 Rule 2 of the High Court Rules of setting aside on the ground of irregularity of default judgment in the Summons.

6. THAT we were advised and verily believe from the said judgment that "It is the judgment as against the 1st Defendant which must be attached and set aside so as to bring the Court to the point of questioning the validity of the Garnishee and the subsequent Writ Fi Fa."

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9. THAT on the 24th day of June, 1997 bailiffs came to our Lautoka Office to execute FiFa whereupon we engaged counsel to appeal the Honourable Court's decision below to refusing to excuse irregularity of not complying with Order 2 Rule 2 of the High Court Rules which decision has occasioned injustice to the Applicant.'

In spite of the bailiffs coming to its Lautoka office the Appellant did not file the present application with reasonable expedition thus showing lack of any urgency.

In the context of the history of this litigation I am of the view that the delay was not small and the reasons advanced for the delay are most unsatisfactory.

Prejudice to Respondents

The Appellant claims that there will be no prejudice to the Respondents.

Surely this submission could not have been made with any degree of seriousness if one bears in mind that the alleged cause of action arose in 1987 and that the judgment, entered in February 1994, remains unsatisfied notwithstanding all persistent efforts on the part of Respondents.

The following uncontradicted statements and contentions contained in the 2nd Respondent's affidavit filed on 2 September 1997 establish without a shadow of doubt that if leave is granted the Respondents will suffer enormous and possibly irretrievable prejudice -

> *"15. The judgement against the third defendant is now over three and a half years old having been entered on the 15th of February 1994.*
>
> *16. The judgement against the third defendant as Garnishee was entered on the 10th of June 1994 and it is now over 3 years old.*
>
> *17. Some of my witnesses are no longer available and the Plaintiffs' will be grievously prejudiced if the judgement were to be set aside now especially after execution has been levied and the judgement has stood for so long.*
>
> *18. Ram Singh son of Issar Singh died last year. He was a vital and irreplaceable witness. He was agent of the first named Plaintiff and a frequent and familiar person at the sawmill and involved in its management. He also visited the sawmill after the take-over. He was familiar with the assets and discovered that some were sold and with enquiries as to where they had gone. For instance he had located that an engine had been sold somewhere in Raki Raki and there is no one else who knows where or to whom it was sold. He was also in part responsible for the instructions leading to these proceedings. He had also gone to the Third Defendant's office at Lautoka on two occasions in respect of related matters and there is no-one else who can give evidence in respect thereof.*
>
> *19. Hukum Singh son of Issar Singh has now migrated to the United States. He is no longer available as a witness.*
>
> *20. Hardayal Singh was another person who had been to the sawmill and would have given relevant evidence for the Plaintiff. He was a Member of Parliament and died on 11th of May 1995. He also was an important witness to matters stated in the statement of claim.*

21. *Mr. Baljeet Singh son of Gajjan Singh has migrated to the United States of America and also is unavailable as witness.*

22. *Mr. Gurdayal Singh a Solicitor and businessman would have given relevant evidence for the Plaintiff but he died in December, 1994.*

23. *The Plaintiffs' (Respondents here) will be very much prejudiced if the Judgement is set aside now.*

24. *I have filed writ of fieri facias to recover the monies and unfortunately to this date it has not been executed. Annexed hereto and marked with the letter "G" is a copy of letter by Messrs. Mishra Prakash & Associates dated 1st July, 1997.*

25. *I have filed an affidavit of debt in the High Court and annexed hereto and marked with the letter "H" is a copy of the same."*

re **Prospect of success on appeal**

Although it is not for me to adjudicate on the merits of the proposed appeal, nevertheless I have had no hesitation in coming to the view, prima facie, that having regard to the history of the litigation, the nature of the proposed grounds of appeal and bearing in mind the failure of the Appellant to comply with the Rules of the High Court notwithstanding clear guidance given by primary judge, the proposed appeal has little if any prospect of succeeding.

There also appears to be merit in the following submissions taken from pages 4, 5, 6 of the Respondents' written submissions -

"Basically all the proposed grounds of Appeal mentioned deal with irregularity. And this will not succeed on the application which was made before Justice Lyons. We submit that in any event the Appellant cannot contend that judgement is irregular and it is implicit (in the circumstances) that the judgement is regular. We refer to Order 2 Rules (2) (1) and (2) (2) of the High Court Rules which are quoted hereunder for ease of reference:-

"2-(1) an application to set aside for irregularity of any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

(2) an application under this rule may be made by Summons or motion and the Grounds of objection must be stated in the summons or notice of motion."

Here the application to set aside in the High Court was not made:-

a) within a reasonable time

b) before the party applying has taken any fresh step after becoming aware of the irregularity

c) the grounds of the objection are not stated in the summons.

As far as (c) is concerned, this Honourable Court had explicitly mentioned Order 2 Rule 2 in its judgement delivered on the 9th day of February, 1996 on page 5 of the judgement and we quote:-

"As Counsel for the Plaintiff points out, the regularity or otherwise of the judgment, is not put in questions. If it were so, O.2 R.2 is the applicable rule. This has not been referred to and so it is implicit that the Third Defendant considers that the judgment has been regularly obtained."

Despite this clear statement, the second summons to set aside judgment in the High Court did not state irregularity of judgment as a ground of objection due to there not being a formal assessment. It therefore is not even properly raised before this Honorable Court. How can this argument even be entertained by this Honorable Court when the judgment of 9th February, 1996 so specifically points out Order 2 Rule 2 but irregularity of judgment is still not stated in the summons dated 8th November, 1996 in the High Court. The appeal is from a summons (which is a second application to set aside judgment) to set aside judgment which <u>does not even purport to rely</u> on Order 2 Rule 2. We quote and rely this Honorable Court's judgment in this case of 9th February, 1996 on page 4:-

"Thus the application brought by the third defendant is defective in that:-

(i) It is brought pursuant to wrong rule;

(ii).....

In my view the applications should be dismissed for want of procedure and compliance with the rules."

We also refer to the 1985 Supreme Court Practise footnote 13/9/6 which provides:-

"If it is desired to set the judgment aside for irregularity, the irregularity must be specified in the summons or notice of motion (O.2, r.2.). The affidavit in support should also state the circumstances under which the default has arisen,....." "

The Court's views

The need for and the importance of complying with the Rules were emphasised as far back as 1983 by this Court in Kenneth John Hart v Air Pacific Ltd, Civil Appeal No. 23 of 1983.

In 1995 the Supreme Court, the highest Court in the land warned ***"We now stress, however, that the Rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal: in cases not having the special combination of features present here, it is unlikely to be excused."*** (See Venkatamma v Ferrier-Watson, Civil Appeal No. CBV0002 of 1992 at p.3 of the typed judgment.)

This year in August the Court of Appeal in Hon Major General Sitiveni Rabuka & Ors v Ratu Viliame Dreunimisimisi & Ors (Civil Appeal No. ABU0011 of 1997) held as follows -

> ***"In all the circumstances, having regard to the history of the proceedings in the High Court and bearing in mind what the Supreme Court said in Venkatamma, we have decided that the proper course for us to follow now is to reject the application for further time to comply with rule 17 and to dismiss the appeal."***

It might be useful to note here that the Appellants in Hon Major General Sitiveni Rabuka's Case were attempting to appeal against a default judgment entered against them in the Suva High Court in 1994.

The history of the present litigation is a saga of inordinate delays, inexcusable defaults, gross negligence and blatant disregard of the Rules on the part of the Appellant. To compound the situation the Appellant has displayed an attitude of defiance verging on contempt of the Court.

The Appellant has not paid any costs to Respondents, has not paid or offered to pay any part of the judgment debt into Court and has disregarded a Garnishee Order.

In my view the Appellant has clearly failed to discharge the onus that lay on it to obtain the Court's indulgence, having lost its right of appeal without leave.

To show any further indulgence would be to compound a deplorable situation, inflict an injustice on the Respondents and undermine the authority of the Courts. If denial results in any hardship on the Appellant then the Appellant must be deemed to be the architect of its own misfortune. The Respondents have already been denied the fruits of their success for an inordinately long time.

Conclusion and orders

This application to extend the time to file an appeal out of time is therefore dismissed. It follows that the application to adduce further evidence is also dismissed. The Appellant is to pay Respondents their costs as far as proceedings before me are concerned. I fix them at $400.00.

Sir Moti Tikaram
President, Fiji Court of Appeal

Suva
25 November 1997.