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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

MISC.APPEAL N0.8 OF 2006
[High Court Civil Action N0.335 of 1997/L]

BETWEEN:

NATIVE LAND TRUST BOARD
AND PONIPATE LESAVUA

APPLICANT

A N D:

SUBRAMANI f/n Armogam

RESPONDENT

Vuataki for applicant
Prakash for respondent

Hearing: 3 July 2006

Ruling: 17 July 2006

RULING

This is an application for leave to appeal out of time. The appeal is from a judgment of Byrne J given on 8 October 2003 and the history of the appeal up to this time is one of repeated delay including the deeming of the first appeal to have been abandoned.

Following judgment, the first step, on 5 January 2004, was to file notice of motion for leave to appeal out of time and the case was given the number ABU 1 of 2004. The application was heard by Tompkins J sitting as a single judge on 10 and 18 March 2004. He found the explanation for the delay unconvincing and the evidence unsatisfactory. He found:

> "Although the delay cannot be excused, I must also have regard to the relatively short period and the absence of prejudice to the respondent. The amount involved is substantial and there are other issues of general importance that warrant the appeal proceeding. I have considered whether there should be an order requiring the appellants to pay the amount of the judgment plus costs into Court but, having regard to the nature of the first appellant, there can be no doubt that the respondent will receive the fruits of his judgment if the appeal is unsuccessful so this course is not necessary.
>
> The application to extend the time for filing the notice of appeal is granted."

As will be seen, the reasons that led to Tompkins J allowing the application no longer apply. The period is now inordinate and the prejudice to the respondent as a result of being kept out of the fruits of his judgment for a little under three years is substantial. The allowance the learned judge accorded the first appellant because of its nature might also be considered, in the light of the continuing failure to pay the judgment sum, to have been misplaced especially as the failure to pay occurred in the absence of a stay of execution or even, for much of the time, of any appeal filed with the Court.

I note that an application for an order to stay execution was heard by Connors J in Lautoka on 14 May 2004. He was equally unimpressed by the arguments of the appellants but, following a careful survey of the relevant authorities concluding with the ruling of the Chief Justice in *Michael Fenech v Iftakhar Iqbal Ahmed Khan*, HBC 215 of 2001, he ruled:

> "In the light of the determination by the Chief Justice, I find myself unable to refuse the application albeit that I am of the opinion that the earlier authorities to which I have referred, warrant such a course being taken. Whilst I find myself unable to refuse the application, the Orders that I propose will limit the extent of the stay.

The Order dated 8th October 2003 be stayed until the first to occur of: –

(a) the hearing of the appeal ABU 1 of 2004

(b) the failure of the appellant to comply with: -

(i) the High Court Rules;

(ii) the Court of Appeal Rules;

(iii) any practice direction;

(iv) any order of the Court of Appeal;

with respect to the preparation of the appeal for hearing and the hearing of the appeal."

Clearly that stay is no longer in force.

Security for costs was fixed and paid in May 2004 and was followed by the preparation of the record. There was then a delay awaiting delivery of the court file from Lautoka and the transcription of the trial judge's notes. They were collected by counsel for the appellants in April 2005.

Once the judge's notes had been collected, there was an initial failure by the Court registry to act for nearly five months followed by a series of requests by the registry for corrections to the record filed. Counsel for the appellants suggests the registry should have pointed out all the necessary corrections at the same time. I accept the registry was at fault in this but the principal responsibility for producing a record in an acceptable form lies on the appellant and that the appellants repeatedly failed to do.

In February 2006 the registry again returned the record for further corrections. Nothing more was heard from the appellants and the appeal was deemed abandoned on 10 May 2006. The reason for that delay has been explained in the affidavit in support of this application. It appears the file was sent by the appellants' solicitor to its city agent who noticed the need for further corrections. They then passed it to the first appellant where still more corrections were suggested. It was finally submitted to the registry on12 May 2006.

By rule 17 of the Court of Appeal Rules, the appellants may file a fresh appeal. The present notice of motion was filed on 2 June 2006. It was necessary to seek leave to appeal out of time. Leave was also sought to have the previous notice of appeal accepted as notice in the fresh appeal. As the notice of appeal had already been drafted for ABU 1 of 2004, the appellants' solicitors had only to file the fresh notice. Even in that, they again failed to comply with the time limits under the Rules.

Thus, I find it difficult to understand the basis of the statements in the affidavit in support by the appellants' solicitor's litigation clerk:

> "20. Further I believe that we had provided good reason for such delay and the Court of Appeal registry has contributed to it as well. We are also diligently prosecuting the appeal.
>
> 21. Also, I verily believe that such delay would not cause serious prejudice to the Respondent because once his lease had expired, the building became fixtures and form part of the land at which point there is no value to it and he was not therefore entitled to any compensation."

Mr Vuataki in his oral submissions also advanced the argument regarding prejudice set out in paragraph 21 of that affidavit. I find such an argument surprising. The respondent is, until and if he loses the appeal, the successful litigant and entitled under the judgment to a substantial sum of money. It is the failure to pay that sum which gives rise to the prejudice and every further delay compounds it. Despite the clear concern of Connors J when he granted the stay, the delay was increased by the appellants' failure to prepare an acceptable record. It is not a proper ground to base possible prejudice arising from delay on the merits of the appeal itself as is done in that paragraph.

Counsel's strongest argument for the grant of leave is that the appeal itself raises important issues in respect of the law on fixtures and the obligations of tenants and landlords at the expiration of a lease of land which has been developed and/or improved by the tenant during his tenancy. Mr Vuataki tells the Court this is a matter of wide reaching significance. I do not judge the chances of success at this stage but it seems

that, if the matter is of such wide reaching importance, the repeated failure of the appellant to prosecute it with any semblance of urgency is hard to comprehend.

Mr Prakash strongly opposes the application. As a preliminary objection he points out that this application should have been made first in the High Court. That is clearly correct. However, the learned trial judge has long since retired and left Fiji. Whilst the application should have been made to another judge of the same court, I do not consider there is now any benefit in sending it back to the High Court first. Whichever judge would then be given the case will have no more direct knowledge of the matter than does this Court and a reference to the High Court at this stage is likely simply to add to the overall delay. In those circumstances, I overrule that objection and shall continue to deal with the application myself.

Mr Prakash points out that the prejudice to the respondent is considerable and is continuing. As a result of the departure of Byrne J from Fiji and the suggested failure of the appellant to ensure the judge's notes were verified before he left, the likelihood that the appeal can be prepared in time for the November session of the Court is questionable.

This Court must consider the length of the delay and the reasons for it, the prejudice to the respondent caused by the delay and any likely further delay and the prospects of success in the appeal.

The file gives insufficient information for me to assess the likelihood of success in the appeal but I accept Mr Vuataki's contention that it raises issues of significance beyond this case alone which would benefit from resolution by this Court.

The problem is that the respondent has been severely prejudiced by the appellants' conduct of the proceedings up to now and I do not consider that can be allowed to continue. As the appellants contend that this appeal bears such significance, it must be a reasonable comment that they should have acted with much greater expedition. Instead, it is their failure to comply with the Rules which has been the principal cause of this appeal taking so long to be ready for hearing. In the meantime, they have shown a disregard for the respondent's position by failing to honour the judgment before or after

the period it was stayed. Counsel tells the Court that an application for a stay will be made to the High Court if leave is given to proceed out of time. In the meantime, counsel has offered to pay one third of the judgment sum to the respondent and the balance into Court.

I do not consider that meets the justice of the present situation.

Although the conduct of the appellants would undoubtedly justify a refusal of this application, I feel counsel's concern about the wider importance of the issues and the need to have them considered by this Court is sufficient to allow the appeal to proceed. However, the length of time and the reason the respondent has been kept out of his judgment make it unreasonable to expect that to continue.

I grant the application and give leave to the appellants to file notice of appeal out of time on the condition that they pay the full judgment sum and costs to the respondent's solicitors and any accrued interest to date into court, both within 28 days of this order. Failure to comply will result in leave being withheld. If it is complied with, the notice of appeal must be filed within seven days of the payment of both sums.

As I have stated, I cannot judge the likelihood of success in this appeal on the limited information before me but, if Mr Vuataki's contention that it has wide significance is correct, this order will allow the appellants to pursue the appeal and receive a judgment on the issues raised. However, after such a delay, I do not consider it just or reasonable to make the respondent wait any longer for the fruits of his judgment while the appellants seek a ruling the significance of which may, apparently, go well beyond that of this particular case.

FIJI COURT OF APPEAL

G. WARD
President
FIJI COURT OF APPEAL

17TH JULY, 2006