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IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

MISCELLANEOUS NO. 29 OF 2007

BETWEEN : **MOHAMMED AZIM f/n Mohammed Khalil**
of Auckland, New Zealand

Applicant (Original Defendant)

AND : **TSUGIO ABE and ENT-TOUT-CAS (FIJI) LTD.**

Respondent (Original Plaintiff)

Before the Honourable Justice of Appeal, Mr John E. Byrne

Counsel : D. Gordon for the Applicant
: P. McDonnell for the Respondent

Dates of Hearing & Submissions : 1st, 8th & 14th November 2007

Date of Ruling : 27th of May 2008

RULING

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[1] The Applicant (original Defendant) seeks leave to appeal out of time and stay from an Extempore Ruling of the Lautoka High Court dated the 2nd of February 2007 in which the High Court gave Summary Judgment for the first named Respondent (original First named Plaintiff).

[2] In about 2001, the First named Respondent identified a piece of Crown land in Malomalo, Nadroga being Lot 1 on DP 8888 *("the property")* which was owned by a Mr Ram Sami f/n Ellaiya. The First named Respondent intended to purchase the property and develop it by constructing buildings and other improvements thereon.

[3] As he was resident in Japan, the First named Respondent appointed the Applicant - a Nadi businessman and Japanese interpreter - on the 18th of September 2001 as his attorney for the purposes of purchasing and developing the said property. The Power of Attorney Reg. No. 38488 was registered at the Titles Registry in Suva on the 21st of September 2001.

[4] Subsequently, the First named Respondent remitted funds from Japan to Fiji amounting to F$112,500.00 and Y16,285.00 to facilitate the purchase and development of the said property.

[5] It was alleged that the Applicant purchased the property in his own name, developed it and then sold it to Capricorn International Hotel for approximately F$500,000.00. The First named Respondent then claimed damages for conversion.

[6] The Applicant in his defence stated that he purchased the property not on behalf of the First named Respondent but for himself and that he had used his own funds in the purchase. He further claimed that the payments made by the First named Respondent were for rent in advance for the term of 3 years. He said nothing more in this regard.

[7] It was submitted, however, that the application for Summary Judgment should fail in accordance with Order 14 Rule 1(2)(b) because the action included an allegation of fraud, and indeed the pleadings show that the term **"fraudulently"** was used several times by the original Plaintiff (First named Respondent). The relief sought, though, is one of damages in conversion.

[8] From the submissions made by the First named Respondent as original Plaintiff, it is quite clear that the use of the term **"fraudulently"** merely added weight to his claim. After considering relevant case law, Connors J. said it was his opinion that the use of **"fraudulent"** in the pleadings does not "enliven the operation of Order 14 Rule 1(2)(b)". I agree.

[9] On the application for leave to appeal out of time, in my judgment it should not be granted on the following grounds:

a) That the application is 7 months out of time;

b) That the Applicant has not satisfied the Court as to the reasons for the delay in appeal, and

c) That the Applicant seeks to introduce documents that should have been adduced before Connors J.

[10] On the issue of setting aside Summary Judgment, Lord Russell of Killowen in **Evans -v- Bartlam** [1973] AC 473 said at page 482:

> ***"...Unless an appellate Court is satisfied that the discretion has been wrongly exercised and should have been exercised in the contrary way, the Judge's order should be affirmed".***

[11] Lord Wright said in the same case at page 486 that:

> ***"It is clear that the Court of appeal should not interfere with the discretion of a Judge***

> ***acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the Judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied the wrong principle".***

[12] Anyone who wishes to set aside such a Judgment must show grounds why the discretion to set aside should be exercised in his or her favour. The Applicant must show that his case has merits to which the Court should pay heed.

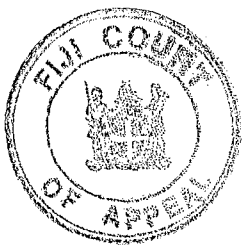
[13] I am not convinced that the Applicant in this matter has shown that his case has any such merits.

[14] He is now claiming that the land in question is different from the land he purchased. He also claims that he has in his possession documents and receipts to that effect. This Court has to, and must ask why these documents were never brought to the Judge's attention in the first instance? Why did the Applicant not depose the same in his affidavits in reply? I find it quite incredible that the Applicant should now, all of a sudden, have documents

that would have greatly aided the Court in making its decision.

[15] The House of Lords in **Evans -v- Bartlam** said that an appellate Court should only intervene if it is satisfied that a wrong principle was applied when the Judge used his discretion to award Judgment in default.

[16] In the light of the reasons given above, I am satisfied that Connors J. used his discretion correctly in giving default Judgment. In my judgment the Applicant's application to set aside that judgment must fail and I so order. The Applicant must pay the Respondent's costs which I fix at $600.00.



[John E Byrne]
JUDGE OF APPEAL

At Suva
27th May 2008