IN THE FIJI COURT OF APPEAL

SUVA, FIJI

[Misc. Appeal No. ABU 007 of 2008]
(An Appeal by the Lautoka High Court No. HBC 033 of 2005L)

BETWEEN : **HARI NARAYAN**

APPLICANT (Original Defendant)

AND : **CHANDAR LOK**

RESPONDENT (Original Plaintiff)

BEFORE THE HONOURABLE JUSTICE OF APPEAL : **Mr. JUSTICE JOHN E. BYRNE**

COUNSEL : **M.K. SAHU KHAN (For the Applicant)**

: **Ms P. KENILOREA (For the Respondent)**

Date of Hearings and Submissions : **27th & 28th May ; 17th October 2008**

Date of Ruling : **Friday, 7th August 2009 At 12 Noon.**

RULING ON APPLICATION FOR LEAVE TO APPEAL OUT OF TIME

[1] During the last few weeks I have given a number of Rulings on applications for leave to appeal out of time. The present application is on my understanding the second last of those currently referred to me.

[2] On the 27th of May 2008 the Applicant filed a Notice of Motion seeking leave to appeal out of time against the judgment of Mr. Justice Jiten Singh delivered on the 22nd of February 2008. The motion was supported by an Affidavit of the Applicant (wrongly referred to as the Appellant) which was sworn on the 7th of May 2008.

[3] On the 22nd of February 2008, Mr. Justice Singh in the High Court in Lautoka gave judgment for the Respondent against the Applicant on a Summons by the Respondent seeking an order for vacant possession against the Applicant who had gone into occupation of a small part of Native Lease Number 44656 of which the Respondent is the Registered Lessee.

[4] The Learned Judge found (and this was not in dispute) that the Native Lease has an area of over 25 acres. Prior to the Respondent becoming the registered lessee his father Ballaiya was the lessee of this lease. In 1988 Ballaiya had given a Power of Attorney to the Respondent. Acting under the powers conferred on him by the Power of Attorney, the Respondent had the lease transferred to himself. The transfer was dated 25th March 1994. The consideration shown on the transfer was $20,000. The transfer was lodged for registration on 10th June 1994 but the actual registration, with the Registrar's signature endorsed on it did not occur until 10 years later on the 11th of June 2004 after certain orders were made by the High Court in Lautoka.

[5] Sometime in September 2001 the applicant went into occupation of a small part of the land and built a house on it. The Respondent stated that upon learning of the Applicant's occupation, he issued a Notice to Quit. The applicant still remained in possession and so he instituted proceedings in the High Court.

[6] The Hearing in the High Court was held on the 13th of November 2007 and the 4th of February 2008 and Judgment was delivered on the 22nd February 2008.

[7] The Applicant's defence was that the Respondent was not the registered lessee of the land in question because the transfer to the Respondent from Ballaiya was of no legal effect due to fraud because it was transferred by the Respondent to himself under a Power of Attorney and that there was total failure of consideration.

[8] Alternatively the Applicant said that he purchased the land in question pursuant to a Sale and Purchase Agreement dated 18th September 2001 and that the Respondent had been paid in full.

THE ISSUES IN THE HIGH COURT

[9] The issues for decision by the Court were :

(a) whether the transfer to the Respondent of the lease was vitiated by fraud;

(b) whether the agreement dated 18th September 2001 passed a legal interest in the land to the applicant.

[10] Dealing with the first issue, in a comparatively brief but nevertheless correct way the Learned Judge discussed the doctrine of indefeasibility of title where fraud is alleged in the Torrens System of Land Registration which is part of the land law of Fiji.

[11] The Learned Judge began with the decision of the Privy Council in Assets Co. Ltd. v. Mere Roihi (1905)AC 176. and concluded with the decision of the High Court of Australia in *Breskvar v. Wall (1971) 126 CLR 376.*

[12] I do not propose to discuss the Learned Judge's consideration of most of these cases but will first quote the somewhat cryptic observation of Sir Garfield Barwick in *Breskvar v. Wall (1971)126 CLR 376* that the Torrens System is ***"not a system of registration of title but a system of title by registration".***

[13] He went on at p386 and said : ***"The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effected according to the terms of the registration. It matters not what the cause or reason for which the instrument is void".***

[14] The next decision referred to by Singh, J was *Waimiha Sawmilling Co.Ltd. v. Waione Timber Co.Ltd. (1923)NZ LR 1137,* a decision of the New Zealand Court of Appeal which was upheld by the Privy Council. In the Court of Appeal Salmond, J at 1173 said of the meaning of fraud: "it means dishonesty – a wilful and conscious disregard and violation of the right of other persons".

[15] I need only add here that Salmond, J has long been regarded as one of New Zealand's most distinguished Jurists and was also a Legislative drafter of great skill. Singh, J continued that the definition of fraud given by Salmond, J has been adopted in Fiji in *Ahilya Sharmar and Another v. Mahendra Pratap Singh ABU 27 of 2003* and *Hardeo Prasad v. Abdul Hamid ABU 59 of 2003.*

[16] Having considered the evidence the Judge concluded that there had been no fraud on the part of the Respondent so that his title was not vitiated by fraud. As to the issue whether the Agreement dated 18th September 2001 passed a legal interest in the land to the defendant, the Trial Judge concluded that it did not for reasons which he gives in detail in paragraphs 16 to 21 of his judgment.

[17] Essentially these were - that the applicant's evidence at the trial and other evidence did not persuade the Judge that the applicant was given a legal interest in the land by the Agreement. The Judge also concluded that the applicant was occupying a portion of native land illegally. He found that there had been no consent obtained from the Native Land Trust Board which was required by Section 12 of the Native Land Trust Act. He also found that the agreement contravened Section 5 of the Subdivision of Lands Act Cap 140.

[18] The Judge found on the balance of probability on the strength of the evidence before him that there was no dishonesty on the part of the respondent in the transfer of the lease to himself under the Power of Attorney and that the agreement relied on the by the applicant was illegal for reasons which I have just stated.

THE APPLICANT'S REASONS FOR APPEALING LATE

[19] In his affidavit in support of the Motion the Applicant deposes that on the 5th of May 2008, a person whom he had never seen before called at his house in Tavua and served him with a certain document the contents of which he had no knowledge. Immediately thereafter he showed this to his present Solicitors who told him that it was a copy of the Lautoka High Court Order under which he was required to give vacant possession of the land he was occupying on or before the 30th of May 2008.
In paragraph 5 he says he had no knowledge of any judgment nor did his previous Solicitor advise him of this. Had he done so, he would have acted immediately to file an appeal.

[20] In paragraph 7, the Applicant states that his present Solicitors advised him that the Order was sealed on the 3rd of March, 2008 but : for some unknown reasons it was not served on him until the 5th of May, 2008 and had it been served immediately his present Solicitors would have filed grounds of appeal within time and the present application would not have been necessary.

[21] Those statements on Oath by the applicant require examination and comment but before doing so, it is useful to state the factors which are normally taken into account when dealing with an application for leave to appeal out of time. They are :

(a) The length of the delay;
(b) The reasons for the delay;
(c) The degree of prejudice to the Respondent if the application is granted;
(d) The prospects of the intended appeal succeeding if the application is granted.

It is therefore obvious that these factors are not exhaustive and as Sir Moti Tikaram said once: ***"It would be wrong to regard them as inflexible".***

[22] In Sundar v. Prasad (1997)FJCA 39;ABU 0022D.97S, Sir Moti said at pg 4 of his decision :

> ***" Nevertheless in the last analysis a Court cannot overlook a determining factor namely that an Applicant will or is likely to suffer an irreparable serious injustice if an extension is not granted."***

[23] **SHOULD THE APPLICANT BE GIVEN LEAVE?**

The Applicant had six weeks in which to appeal from the date of sealing of the Order that is until the 14th of April 2008. He filed his present Motion on the 8th of May 2008 approximately three and a half weeks (3 ½) weeks overdue.

[24] It is not denied by the Applicant that his previous Solicitors were given a Notice of Judgment by the Lautoka High Court that judgment would be delivered on the 22nd of February 2008. I therefore cannot accept his claim that he knew nothing about the judgment. There is no affidavit by his former Solicitor Mr Shah that his office did not bring the judgment of the court to the applicant's notice.

Furthermore, an Affidavit of service of Mohammed Takki a Registered Bailiff sworn on the 27th of March 2008 states that on the 14th of March 2008 he personally served the applicant with a true copy of the Order of the Court.

[25] At the time of service of the Order, the applicant accepted it but failed to acknowledge it by signing on the copy provided. To my mind this was an attempt by the applicant to feign ignorance in the hope that by not acknowledging service he would not be found to have been served.

[26] I therefore reject the applicant's claim of ignorance of the Order.

[27] In accordance with the correct practice the applicant has filed a proposed Notice of Appeal which contains seven (7) proposed grounds. Grounds 1,2, 3 and 5 & 6 refer to the transfer of the land into the respondent's name.

[28] It was not denied by the Applicant in his Defence that he had bought the land under a Sale Purchase Agreement dated 18th September 2001 and the Respondent had been paid in full. I deduce from Grounds 1,2,3 and 5 & 6 that the applicant is now trying to impugn the Respondent's title. If so, then arguably the applicant is now estopped from denying the respondent's title.

[29] Ground 4 alleges the Judge did not properly consider the question of fraud. In my view this ground has no substance because the Judge made numerous references to fraud in his judgment. I refer particularly to paragraphs 8 to 15. In paragraph 10 the Judge writes:

> ***"The crucial time under the Land Transfer Act is the time of registration. It is the registration at the Titles Office and not the purchase that gives the purchaser protection under the Act. After all it is a system of title by registration. The crucial time in relation to knowledge even of an unregistered instrument is the time of registration not purchase".:***
> ***Webb v.Hooper (1953) NZLR 111.***

[30] In paragraph 12 the Judge says:

> ***"All the evidence I have on fraud is that the plaintiff who was donee of a power of attorney from his father executed a transfer of land to himself. The transfer is signed before a Solicitor. The plaintiff stated that he paid the consideration to his father over a period of three or four years in instalments. There is no contradictory evidence to this and I accept it".***

[31] It is clear to me that the Judge did consider fraud and on his assessment of the credibility of the Witnesses found that there was no fraud by the Respondent.

[32] Ground 6 alleges that the Learned Trial Judge erred in not making adequate or proper enquiries as to whether the transfer in the name of the respondent on the11th June 2004 had the prior consent of the Native Land Trust Board in terms of Section 12 of the Native Land Trust Act.

[33] There is no merit in this ground because the Judge found as a fact that the relevant consent had not been obtained from the authorities.

[34] Proposed Ground 7 claims that the Learned Trial Judge failed to consider that in 2001 the Respondent had no right to serve a Notice to Quit on the applicant when the registration of the transfer did not take place in his name until the 11th of June 2004.

[35] It would seem that no argument on this was addressed to the Trial Judge because he does not mention it in his judgment. In any event whether the Respondent was the registered proprietor at the time or not does not mean that he could not serve a Notice to Quit, Even a tenant can serve a Notice to Quit on the sub-tenant without being registered on the title. Furthermore the Notice did give the applicant warning that the respondent regarded him as a trespasser and he should have at that stage sought legal advice as to his legal position.

[36] The applicant submits that the Respondent would not suffer any prejudice if I were to grant a stay. I do not accept this. This case began in 2005 in the High Court and it is desirable that it be resolved at the earliest opportunity. The Respondent is entitled to the fruits of his judgment. At the moment he is unable to enjoy his entitlement and develop the land which he purchased. I find no substance in this proposed ground.

[37] It is true that on any application of this nature the Court should not delve into the merits of an appeal but in order to assess the likely chances of success if leave is to be granted the Court is entitled to analyze the proposed grounds of appeal to see whether justice will be served by granting leave.

[38] It seems to me however that the biggest problem facing the Applicant is that the Trial Judge based his decision apart from any law on his assessment of the credibility of the parties. In this regard it is well to quote the passage from the opinion of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co.,Ltd. (1919)S.C.(H.L)35,37 which was quoted with approval by Viscount Sankey L.C. in Powell vs. Streatham Manor Nursing Home (1935) A.C.243,250:* Lord Shaw said: ***"In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment".***

Lord Shaw had already pointed out that these privileges involved more than questions of credibility and said: ***"Witnesses without any conscious bias towards a conclusion may have in their demeanor, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page."***

[1947 L.R. pp 488 – 489].

[39] The Trial Judge who was experienced had the benefit of seeing all the witnesses and making a judgment on their credibility. That he did so in favour of the Respondent is something which the Applicant must accept.

[40] Taking all these matters into account in my view the Applicant does not have any reasonable prospect of succeeding in the Appeal even if time were allowed.

[41] The result is that I refuse leave to appeal and order the Applicant to pay the Respondent's costs to be taxed if not agreed.

Dated this 7th day of August 2009.

FIJI COURT OF APPEAL

JOHN E. BYRNE

JUDGE OF APPEAL