

IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

APPELLATE JURISDICTION

HIGH COURT CIVIL APPEAL NO: HBC 190 OF 2009

MISCELLANEOUS CASE NO: 20 OF 2009

BETWEEN: **HERBERT CONSTRUCTION COMPANY (FIJI) LTD**

APPELLANT

AND: **FIJI NATIONAL PROVIDENT FUND**

RESPONDENT

Counsel:

Appellant	-	Mr. David O'Connor
	-	Mr. Simone Valenitabua
Respondent	-	Mr. A. K. Narayan

Date of Hearing: Tuesday, 19th January, 2010.

Date of Judgment: Wednesday, 3rd February, 2010.

JUDGMENT OF THE COURT

- [1.] This is an application for leave to appeal out of time and the intending appellant seeks leave of this court to bring an appeal out of time against the Judgment delivered in High Court Case No. 190 Of 2009 on 24 August 2009.

- [2.] The application is mainly on the basis that the appeal was abandoned because after the notice of appeal was filed and served, the appellant's solicitors Howards Lawyers inadvertently failed to file an affidavit of service, and the mistake was an oversight by Howards lawyers.

The Grounds of Appeal

- [3.] The proposed grounds of appeal are:

Mortgage No. 577303

1. *The Learned Judge erred in declining to make a declaration that mortgage No. 577303 does not provide proper and valid security for the swapped land.*
2. *The Learned Judge erred in finding that requests for new certificates of title were in fact memoranda varying mortgage No. 577303 pursuant to section 66 of the Land Transfer Act.*

Floating debenture

3. *The Learned Judge erred in declining to make a declaration that the floating debenture dated 21 November 2005, registered at the Companies Office in Suva, was null and void.*
4. *The Learned Judge erred in finding that no consent was required from the NLTB for the floating debenture.*

Ownership of structures and building materials

5. *The Learned Judge erred in finding that the structures built on the foreshore land on Momi Bay by Herbert Construction were not owned by Herbert Construction under the romaipa clause in the building contract.*
6. *The Learned Judge failed to make a finding in respect of the ownership of the building materials which are still on site including pre-cast building floor slabs, temporary form work and temporary site sheds.*

The Chronology of Events

- [4.] In this case it is nothing but fair to analyze the chronology of events. The judgment was delivered on 24/08/2009. Notice of Appeal filed on 11/09/2009. Howards Lawyers served Notice of Appeal on 14/9/2009.
- [5.] It is said in the Affidavit in Support filed by the appellant that appellant instructed the Howards Lawyers to appeal against the decision. On telephoning the court officer on 3rd November 2009 they have got to know that the appeal had been abandoned.
- [6.] On inquiring further on 4th November 2009 only they got to know that the appeal was abandoned on 18th September 2009 as Howards Lawyers had failed to file an Affidavit of Service within the required period.

The Submissions

- [7.] It is contended by the intended appellant that as soon as it was discovered that its appeal was abandoned, this application is filed and it has arguable points of law, the issue is of public importance and that there is no prejudice to the respondent.
- [8.] It is submitted on behalf of the respondent that even after the appeal was abandoned for non compliance of Rule 17(1) (a) (i) and (ii) fresh appeal could have been lodged in terms of Rule 17(2) (b) of the Court of Appeal Amended Rules 1999 by the intended appellant. Therefore that the delay is of more than 2 months and on this ground itself leave should be refused.
- [9.] Further it is submitted that no explanation is given by the appellant's Solicitors to say whether it was a mistake or oversight.
- [10.] It is submitted further that the appellant's affidavit in support does not allude to any prejudice which will be caused to appellant if the leave is not granted and even if the appellant has a reasonable prospect of success this does not necessarily mean that leave must be granted as a matter of course.
- [11.] It is contended on behalf of the Respondent that the Howards Lawyers have not filed an affidavit and therefore there is no sufficient material before court to decide as to why Howards Lawyers did not take necessary steps to proceed with the appeal. It is said in Affidavit in Support of the Appellant that Howards Lawyers never responded to the request made on behalf of the appellant to clarify what has been done and not done by Howards Lawyers on appeal.

The Law

- [12.] It is well settled law that once the rules are not followed it is the discretion of the court to grant leave to appeal out of time and that the onus rests upon the appellant to satisfy the court that in all circumstances the justice of the case requires that he be given an opportunity to appeal out of time against the judgment he wishes to appeal.
- [13.] In Ist Deo Maharaj v. Burns Philip (South Sea) Company Ltd, Civil Appeal No. ABU0051 of 1994S citing the judgment of Norwich and Peterborough Building Society v. Steed (1991) 2 All ER 880 CA it was said:-

"The court has unfettered discretion in the grant or refusal of leave. The factors which are normally taken into account in deciding whether to grant an extension of time are:

- (a) the length of the delay;*
- (b) the reasons for the delay;*
- (c) the chances of succeeding if time for appealing is extended; and*
- (d) the degree of prejudice to the Respondent if the application is granted."*

- [14.] In Avery v Public Services Appeal Board (No.2) (1973) 2 NZLR 86 it was said:

"Everything is left to the discretion of the court on wide basis that leave may be granted in such cases as justice of the case may require. In order to determine the justice of any particular case the court should I think have regard to the whole history of the matter, including the conduct of the parties."

Analysis

- [15.] I have carefully considered the submission made by Counsels for both parties. I intend to deal with this application under the following heads:-
- (a) The reasons for the delay
 - (b) The length of the delay
 - (c) The Merits of Appeal
 - (d) The Prejudice.

The Reasons for the Delay

- [16.] The appellant's solicitors wrote to Howards lawyers to brief them on what actions they had taken after the judgment was delivered. For professional reasons Howards Lawyers have refused to give an affidavit. The reasons for their failure to file an affidavit of service on time which led to the appeal being abandoned are not known but definitely it was inaction on the solicitors part which led to such consequences.
- [17.] "The solicitors or counsels who carelessly and without adequate justification allow the time for filing a notice of appeal to pass, may well be held responsible. The refusal of an application to extend the time may well result, to be followed by an action for negligence against the solicitor or counsel which may be impossible to resist." Per Justice Tompkins JA in Native Land Trust Board v. Ponipate Lesavua & Subramani, FCA, Civil Appeal ABU0001 of 2004.
- [18.] Although the excerpt from the above judgment refers to filing of notice of appeal, the principle, in my view equally applies to filing of any documents and therefore applies to this case as well.
- [19.] The delay and the reasons for the same are not provided by Howards Lawyers but I must bear in mind the position of the appellant who is definitely in difficulty to explain the delay. I am of the view that together with the appellant's difficulty, there are other combining grounds which must be examined to see if the application for leave to appeal out of time be granted.
- [20.] In Winstanley v Winstanley (1998) EWCA Civ 807 referring to the case Gatti v Shoosmith (1939) 3 All ER 916 it was said

"An extension of time can be granted, in appropriate circumstances, even though the failure to appeal in time was due to a mistake on the part of a legal adviser".

The Length of the Delay

- [21.] As soon as the appellant's solicitors ascertained the factual position from Howards Lawyers on the status of the matter, they immediately made this application. I find the delay to be relatively short.

Merits of the Appeal

[22.] It is not my duty or function to go into the actual merits of the appeal. It is a function that is vested in Full Court. At this stage it is my duty to see if the appeal is wholly unmeritorious or unlikely to succeed. If it is, then, it is futile to grant leave to argue the appeal.

[23.] On the subject of a single judge assessing the merits of the appeal it was said in Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji [1991] FJCA 4: Abu0067d.90s

"It is not my function to assess the actual merits of the appeal but if prima facie it is obvious that the appeal is wholly unmeritorious or wholly unlikely to succeed then it would be appropriate for me to say so. As to the contention that the points raised are not novel all I can say is that the issue of novelty itself is not crucial. The important point is whether there is a serious question for adjudication as opposed to it being frivolous or vexatious".

[24.] At this stage I cannot find any fundamental error in the judgment. However the subject matter involves serious questions for adjudication. The points raised are novel as well. They are not frivolous or vexatious. Further there is substantial amount of money involved. When considering the proposed grounds of appeal it is important in matters of this nature that the Full Court hears the appeal and decides on the actual merits.

[25.] In the case of Native Land Trust Board v. Ponipate Lesavua & Subramani, FCA, Civil Appeal ABU0001 of 2004 leave was granted to appeal out of time because the amount involved was substantial and there were issues of general importance. It was also found the delay inexcusable but minimal. There was also absence of prejudice to the respondent. I find this case similar to the one before me and I am of the view that leave should be granted.

The Prejudice

[26.] On the prejudice factor, the appellant has said nothing in the affidavit. However during the submission this was briefly addressed. The appellant's position on this factor is that if leave is not granted then the subject property may be foreclosed after which there will not be any security for appellant to enforce.

[27.] The respondent submitted that after the judgment they have taken steps to foreclose the property and if the sale does not proceed the monies owed cannot be recovered. The public will suffer too as it is the public money that the Fund holds.

[28.] I cannot accept the respondent's argument that its client and the general public will be prejudiced if time is allowed for appeal. No doubt that they would have spent time and

money in getting the property to auction . I also concede that a successful party must enjoy the fruits of the judgment. However I cannot help mentioning that if the appellant is unsuccessful after the final appeal, the respondent will definitely enjoy the fruits of its judgment. It is only a matter of time. The respondent will also be able to recover the cost of this action, the principal debt and the interest on the debt, as is usually the practice of the creditors. The losing party does end up paying substantial amount of cost. The appellant if unsuccessful will pay the penalty in the aforesaid manner.

[29.] I do not see how the public will suffer if leave to appeal is granted. The public will definitely recover this money at some point of time if the appellant is unsuccessful. It cannot be a case that at present there is no money left in the Fund for the members to be paid back and this money is awaited.

[30] It will cause prejudice to the appellant if the appeal is successful and the property is foreclosed. The appeal then would be rendered nugatory.

[31.] I find the prejudice factor in favour of the appellant.

For the aforesaid reasons following orders are made:

[32.] The application for leave to appeal out of time is allowed

[33.] The notice is to be filed within 7 days from today.

[34.] Costs of this application shall be costs in the appeal.



A handwritten signature in black ink, appearing to read "Priyantha Fernando".

Priyantha Fernando

Puisne Judge

3.02.2010