IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

Misc. Action No. 14 of 2009
[On appeal from the High Court of Fiji
At Suva Action No. HBC 446 of 2005]

BETWEEN : ATUL NARAYAN

(APPLICANT/ORIGINAL PLAINTIFF)

AND : NAVEDETA ASWINI NARAYAN AND APRADETA ASHWINI NARAYAN

(RESPONDENTS/ORIGINAL DEFENDANTS)

CORAM : Hon. Mr. Justice John E. Byrne, Acting President

COUNSEL : S. Stanton and N. Prasad for the Applicant

: Ms P. Kenilorea for the Respondents

DATES OF HEARINGS AND SUBMISSIONS : 30the October 2009, 21st May 2010.

DATE OF RULING : 3rd September 2010

RULING ON APPLICATION FOR LEAVE FOR ENLARGEMENT OF TIME FOR FILING AN APPEAL

INTRODUCTION

[1] The applicant seeks leave to appeal out of time the order of the High Court (Mr Justice Hickie) dated 13th of March 2009. The application is made by Summons dated 12th October 2009. The applicant relies on an affidavit of himself sworn on the 12th October 2009 in support of the summons.

[2] The respondents oppose the application and on 2nd December 2009 filed an Affidavit in Reply sworn by Jagdish Kumar, a Legal Executive in the employment of the Solicitors for the Respondents.

[3] Both the applicant and respondents are non-residents of Fiji, the applicant residing in New South Wales, Australia and the respondents in New Zealand.

THE RULING OF HICKIE, J

[4] On the 25th and 26th of August 2008, Hickie, J heard argument on a preliminary point of law to be determined on agreed facts and skeleton submissions filed on behalf of the parties. The preliminary question which Hickie, J was asked to decide was : **"Having regard to the provisions of Sections 6 and 7 of the Land Sales Act Cap 137 whether the document titled "PROPOSAL TO PURCHASE DILKUSHA LAND" dated 8th August 2003 ("THE AGREEMENT") for Sale and Purchase of Land was or is Illegal, Void and Unenforceable at Law as contended by the Defendants or was or is the Agreement a valid, legal and enforceable contract of sale and purchase of land as contended by the Plaintiff?"**

THE ESSENTIAL AGREED FACTS

[5] As stated above none of the parties is a resident of Fiji. On 8th August 2003, the respondents signed the document which the applicant alleges to be an

agreement or contract with him for the sale of certain freehold lands comprised and described in Certificate of Title No. 10907 and Certificate of Title No. 11976 containing approximately 60 acres and 3 acres 2 roods and 12 perches respectively situated at Dilkusha, Nausori, Fiji Islands ("THE LAND") for the price of FD$100,000.00.

[6] As at 8th August 2003, when the agreement was signed:

(a) no application had been made to the Minister responsible for land matters for his consent to purchase the said land; and

(b) no prior consent in writing of the Minister to the proposed purchase of the said land had been granted or obtained.

[7] It is part of the agreed facts that the applicant expended sums of money from 30th October 2003 for work in preparation to his obtaining separate titles to the land in Certificate of Title No. 10907 and in Certificate of Title No. 11976.

[8] On the 10th October 2004 the respondents cancelled the said Agreement notifying the applicant of this by a document sent to him by facsimile transmission. On 9th November 2004 the applicant advised the respondents through his Solicitors that cancellation of the agreement was not acceptable and gave notice of intention to proceed by way of legal action for specific performance of the Agreement. The respondents replied through their solicitors giving notice that they would be defending any legal action and proceedings for specific performance of the Agreement.

[9] On 1st September 2005, the applicant issued a Writ against the Respondents seeking specific performance of the Agreement and other remedies. The respondents defended this claim and sought dismissal of the action.

[10] On the preliminary point of law, Hickie, J held that having regard to the provisions of Section 6 and 7 of the Land sales Act Cap 137 the document entitled "PROPOSAL to PURCHASE DILKUSHA LAND" dated 8th August 2003 ("THE AGREEMENT") for sale and purchase of the land was illegal, void and unenforceable at law.

THE SUMMONS NOW BEFORE ME

[11] On the 12th of October 2009, that is 7 months after the order of Hickie, J was made, the applicant issued the Summons which I have to consider. It sought leave for enlargement of time for filing an appeal and leave to appeal against the ruling of Mr Justice Hickie which was dated the 7th February 2009 and perfected on the 13th of March 2009.

[12] The primary ground of appeal which the applicant seeks leave to argue is that the Learned Judge failed to construe, analyse or make findings with respect to the document dated 8th August 2003 which was the basis of the applicant's case. In addition, the applicant alleges that the Learned Judge failed to correctly apply Sections 6 and 7 of the Act.

[13] The applicant deposed in his affidavit of 12th October 2009 that he always had the intention to appeal the ruling of Hickie, J and on 16th August 2009 filed a Notice of Appeal.

[13] The applicant agrees that he did not apply to fix Security for Costs within the required time under the Court of Appeal Rules and thus Civil Appeal No.14 of 2009 was deemed to be abandoned.

[14] The applicant states that the delay in making an application for security for costs was due to late instructions in relation to the finalisation of the Grounds of Appeal.

[15] He states that the delay has not caused any prejudice to the Respondents since the Ruling was non-monetary in nature and the *status quo* has remained and will remain until the appeal is heard.

[16] The applicant undertakes to expeditiously prosecute his appeal if this Court grants leave.

THE RESPONDENT'S REPLY

[17] The respondents point out that the applicant's appeal was discontinued on 14th April 2009. A fresh Notice of Appeal No. 0014 of 2009 dated 14th April 2009 was filed on 16th April 2009 and served on the respondent that day.

[18] The respondents claim, and this is not denied by the applicant, that the applicant failed to diligently prosecute his appeal as required by the rules.

[19] The respondents deny that they have not suffered any prejudice as a result of the applicant's actions and say that all further delays will continue to cause prejudice to them. They wish to end the litigation in respect of the land and start developing it.

[20] They say that although they do not have a monetary judgment to be paid they do have an Order in their favour for payment of costs to be taxed if not agreed. The costs have not been agreed and taxation of costs has been delayed with prejudice to the respondents.

[21] There is no order of the Court for a Stay that the *status quo* remains until the hearing of the proposed appeal.

[22] The respondents are the Administratices of the Estate of Samuel Lal Shyamji and have been sued in such capacity. The land subject of this action is owned by the Estate.

DELAY BY THE APPLICANT

[23] At the time of the respondent's submission opposing leave more than 13 months had elapsed from the date of the order of Hickie, J. This Court has said frequently that time limits stated in the Rules of the Court must be obeyed subject to a Judge considering there are extenuating circumstances or good reasons for not so doing. *Prima facie* this delay is inordinate but this of itself is not the only factor to be considered because under Section 17 of the Court of Appeal Act the court may entertain an appeal on any terms which it thinks just. There is much case law on the subject and I will content myself by referring to only a few of the authorities. The guiding principle established by the cases is whether justice as between the parties is best served by granting or refusing the extension sought, and this involves a consideration of all factors, including the prospects of the success of the appeal if the extension be granted – per McInerney, J in *Hughes v. National Trustees Executors and Agency Co. of Australasia Limited (1978) V.R. 257* `at p.262. This statement was approved by McHugh, J in the High Court of Australia in *Gallo v. Dawson (1990) 93 A.L.R 479 at 480*. In the latter case McHugh, J also said at p P.481 that a case would need to be exceptional before a Court would enlarge by many months the time for lodging an appeal simply because an applicant had refrained from appealing until he or she has researched the issues involved.

[24] The main reason offered by the applicant is that the delay in his applying for security for costs was because of "late instructions to finalisation of the grant of appeal". I have no hesitation in saying that this is not sufficient reason for granting leave.

[25] Put simply the onus is on an appellant to get on with his or her appeal. A respondent is under no duty to prod a tardy applicant into pursuing an appeal or complying with a preliminary condition precedent to doing so.

[26] There is however in my opinion a reason which leads me to grant the application subject to an order for costs which I will mention later. In this case in what I regard as an excellent ruling, Hickie, J drew attention to the apparent conflict between the decision of the Full Court of this Court in *Port Denarau Marina Ltd v. Tokomaru Ltd* (unreported, Civil Appeal No. ABU 0026U 2005S) of the 6th of December 2006 and the judgment of the Supreme Court in *Gonzalez v. Akhtar Civil Appeal No. CBV 00011 of 2002S,* of 21st May 2004 and the judgment of Palmer, J in *Hunter v. Apgar (1989) 35 F.L.R 180* and *Sakashita v. Concave Investment Ltd HBC 0121 of 1998, 5th February 1999*, Fatiaki, J.

[27] In *Hunter v. Apgar Palmer*, J ruled that an agreement for the sale of land to purchasers who are non-residents was unlawful unless the Minister's consent to the purchase had first been obtained. He said at p.185A :

> ***"The Land Sales Act.....aims directly at the non-resident. It provides a mechanism to ensure that a non-resident cannot obtain any enforceable right in relation to land right at the outset, the Minister has had the opportunity of prohibiting any such transaction or imposing terms and conditions for his consent to the same."*** [My emphasis]

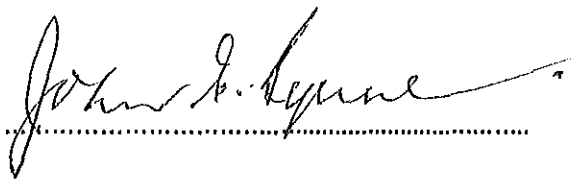
[28] Fatiaki, J followed at Hunter v. Apgar in Sakashita's case and both judgments were approved by the Supreme Court in Gonzales v. Akhtar. In paragraph 25 of his Ruling in this case, Hickie, J mentioned the apparent conflict between Port Denarau Marina and Hunter v. Apgar, Sakashita and Gonzales v. Akhtar but said that it could be argued that the three judgments could be accommodated in that Gonzales involved a situation where the parties to the respective agreements only became aware of Section 6(1) of the Land Sales Act *after the agreement had been made.*

[29] In Sakashita's case, Fatiaki J cited local legislation, namely the evidential requirements of Section 59(d) of the **Indemnity Guarantee and Bailment Act** (Cap 232) to support his conclusion that Ministerial consent must be obtained prior to the execution by a non-resident of a written memorandum or note evidencing such purchase, lease or disposition of land to enable the contract to be enforceable. I share Hickie, J's surprise that the Court of Appeal in Port Denarau Marina did not deal with Fatiaki, J's view because "in the case before us, neither side invoked that principle. In the absence of argument we do not propose to consider this approach further". It is perhaps regrettable that the Court did not deal with the question when, if it had, it could have put beyond any doubt the law on this question which is frequently before the Courts.

[30] This leads me to the conclusion that it is desirable in the interest of Justice that the Full Court should consider this question and, hopefully put it beyond any doubt. It would be inappropriate for me to say any more in this interlocutory Ruling although I have perhaps given a broad hint as to my views on the question.

[31] The applicant concedes that if I grant leave this must be at the expense of the applicant in the form of an order for costs of this application. I therefore grant the application on condition that the applicant pay the respondents' costs which I fix at $2000 within 21 days of the delivery of my Ruling.

Dated at Suva this 3rd day of September 2010.



John E. Byrne
Acting President