

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

CIVIL APPEAL NO. ABU 24 OF 2014
(High Court No. HBJ 2 of 2010)

BETWEEN : HAI SOON INTERNATIONAL TRADING PTE. LTD.

Appellant

AND : THE OWNERS OF THE MV "YIN CHEN NO.1"
: TSAI WAN LIU
: CONSOLIDATION ENTERPRISES LIMITED
: TUNA FISHING (VANUATU) COMPANY LIMITED

Respondents

Coram : Chandra RJA

Counsel : Ms. J. Lal with Ms. S. Devan for the Appellant
Mr. K. Jamnadas for the 2nd and 3rd Respondents
Ms. M. Rakai for the 4th Respondent

Date of Hearing : 14 October 2016

Date of Ruling : 7 December 2016

RULING

[1] This is an application for leave to appeal out of time pursuant to Section 20(1)(a) and (b) of the Court of Appeal Act (Cap.12).

[2] The background to the application can be briefly set out as follows:

- a) On or about the 30 July 2008 the Applicant herein issued admiralty proceedings against the first Respondent claiming inter alia an order for the arrest of the vessel 'Yin Chen No.1' on account of fuel owed to the Appellant in the sum of US\$197,342.60.
- b) On or about the 6 August 2008, an order was made to arrest the said vessel.
- d) On 14 August 2008 an order was made for Tsai Wan Lu (present 2nd Respondent) to intervene in the proceedings.
- e) On 3 September 2008 the Appellant filed summons for judgment in the sum of US\$197,342.60 and for order that the vessel be sold pursuant to an order of the Court under the supervision and control of the Admiralty Marshall.
- f) On 17 September 2008 the 2nd respondent filed an application for Judgment in the sum of FJ\$388,748.98.
- g) A default judgment was entered against the 2nd Respondent in the sum of FJ\$388,748.98 on the 2nd Respondent's claim.
- h) On 19 September 2008 a Caveat against release and payment out was filed by the 4th Respondent.
- i) On 24 September 2008 an order was made for the sale of the vessel and also a judgment was entered in the sum of US\$197,342.60 for the Appellant with costs.
- k) On 1st October 2008 the 3rd Respondent filed an application seeking judgment in the sum of US\$59,800.65.
- l) On 8 October 2008 the 4th Respondent made an application to be joined as an Intervener and on 9th October order was made accordingly to join him as the 4th Respondent.

- m) On 24 December 2009 order was made to sell the vessel to Durga Prasad. The vessel was sold for FJ\$120,000.00 and the sale proceeds are now held by the High court.
 - n) On 4 March 2010 the Appellant filed an application relating to costs of the Appellant.
 - o) On 9 July 2010 the 4th Respondent filed an application for payment out to it of such of US\$67,491.66.
 - p) On 6 June 201 it was brought to the Court's attention that there was no cheque provided in the Affidavit in support filed by the Appellant, receipts of the two lump sum payments to the security service do not have a TIN number and the amounts were exorbitant sums
 - q) On 17th February 2014 the learned trial Judge heard the application of the Appellant claiming the costs incurred by the arresting, maintaining and selling the ship and that the sum of \$120,000.00 should be paid out to the Solicitors trust account.
3. On 17 February 2014 the learned trial Judge delivered her decision and made the following orders:
- (i) That the Plaintiff is entitled to have its costs taxed for the arrest and sale of the vessel between the period of 6.8.2008 and 24.09.2009. Such costs must be taxed on party and party basis by the Master of the Court.
 - (ii) That the following should not be included in the taxation:
 - (a) Any costs incurred before and after the sale.
 - (b) Double VAT payments.
 - (c) The Bond (subject to the indication from the Admiralty Marshal on what portion has been utilized. The monies used can be allowed in the bill of costs.)
 - (d) Payments made to Allied Security Limited.

- (e) Costs for attending to tenders from Nquyen Thi Cam Tu and Ratu Tevita Uluilakeba Mara.
 - (f) The bill of cost No.9848 dated 10 April 2012 is to be excluded as it is for fees incurred after the order for the sale of vessel.
 - (g) The disbursements are to be allowed only upon production of receipts for the same.
- (iii) That the costs paid to Allied security Limited are refused.
 - (iv) I now send this matter to the Master for taxation after which I will, from the balance proceeds, determine the priority of payments between the claimants.
 - (v) The Registry must assign a date before the Master.
4. The Appellant filed a Notice and grounds of appeal on 1 April 2014 which was rejected by the Registry as it was out of time.
 5. The Appellant thereafter filed a summons for leave to appeal out of time on 2 April 2014 time stating that the application is made pursuant to Section 20(1)(a) and (b) of the Court of Appeal Act (Cap.12).
 6. The Respondents filed their affidavits opposing the application of the Appellant and thereafter all parties filed written submissions.
 7. The application of the Applicant has been filed pursuant to section 20(1)(a) and (b) of the Court of Appeal Act. The Respondents have taken up the position that the Appellant's application is as the decision of the learned trial Judge given on 17 February 2014 is an interlocutory decision.

8. Therefore the question as to whether the Appellant has followed the correct procedure has to be determined, as the correct procedure to seek leave to appeal against an interlocutory order should be in terms of section 12(2)(f) of the Court of Appeal Act.
9. The application of the Appellant is seeking leave to appeal out of time regarding the decision of the learned trial Judge regarding an application made by the Appellant on the issue of costs as costs were the first priority claim on the funds.
10. The main case was an Admiralty matter which was in respect of the vessel which was arrested and sold. Further, the learned trial Judge in her decision of 17 February 2014 gave directions that the matter be sent before the Master for taxation after which she would from the balance proceeds, determine the priority of payments between the claimants.
11. In **Goundar v. Minister for Health** [2008] FJCA 40; ABU 0075.2006S (9 July 2008) it was stated that”

“37.Where proceedings are commenced in the High Court in the Court’s original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declaration, the judgment and orders are not interlocutory.

38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration.”
12. The above principles laid down in **Goundar v. Minister for Health** were applied in **Prince Lakshman v. Estate Management Services Limited** (unreported ABU 14 of 2012).

13. On a reading of the decision in the present case in the light of the above principles, it is clear that it is an interlocutory order. In such an event the proper procedure to follow would have been in terms of section 12(2)(f) of the Court of Appeal Act.

14. In Proline Boating Company Limited v. The Director of Lands & Others Misc. Action 39A of 2011 (High Court HBJ 2 of 2010, 17 May 2013, Calanchini AP (as he was then) stated:

“[4]..... it is clear that in the present case pursuant to section 12(2)(f) of the act the Court of Appeal and the Court below exercise what is termed a concurrent jurisdiction in relation to, amongst others, an application for leave to appeal an interlocutory judgment of the High court to the court of Appeal. There is however a requirement in the Court of Appeal Rules (the Rules) as to how an appellant is to invoke the concurrent jurisdiction. Rule 26(3) of the Rules states:

“Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below.”

[5] Although the opening words of the sub-rule state “under these Rules” I am of the view that the same procedure should apply whenever whether under the Act or the Rules concurrent jurisdiction is given to the court below and to the Court of Appeal. Therefore, whenever the Court of Appeal and the Court below have concurrent jurisdiction in relation to a particular application, such as an application for leave to appeal, that application must first be made to the judge in the court below (in this case the High Court).”


15. As the decision against which the Appellant has sought to appeal is an interlocutory order the proper procedure for the Appellant to have followed was to make an application for leave to appeal out of time in terms of section 12(2)(b) read with Rule 26(3) of the Rules of the Court of Appeal Act to the High Court and not to the Court of Appeal.

16. In the above circumstances as the Appellant has made a wrong application seeking leave to appeal out of time to the Court of Appeal without having recourse to the High Court, it cannot be entertained and has to be struck out.
17. The Appellant in their written submission have dealt with their application in terms of section 20(1) and (b) and have made submissions regarding the principles relating to an application for leave to appeal out of time.
18. Although the Respondents have taken up the position that the Appellant had followed the wrong procedure in appealing against the decision of the learned trial Judge, they have not made any attempt to make submissions on that aspect even though they were given an opportunity to respond to the position taken up by the Respondents.
19. In the above circumstances, the application of the Appellant seeking leave to appeal out of time from the Court of Appeal is struck out as the proper course for them to have adopted was for them to have made an application to the High Court.

Orders of Court:

- (1) The application for leave to appeal out of time is struck out.*
- (2) The Appellants shall pay costs in a sum of \$750 each to the 2nd, 3rd and 4th Respondents.*




Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL