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

CRIMINAL APPEAL ABU 17 of 2015
(High Court HBC 197 of 2013)

BETWEEN : **MANDA YOLANDE IHAKA**

Appellant

AND : **VINAY SANDEEP PRAKASH**

Respondent

Coram : **Calanchini P**

Counsel : **Mr K Vuataki for the Appellant**
Mr R Singh for the Respondent

Date of Hearing : **3 November 2015**

Date of Ruling : **15 April 2016**

RULING

[1] This is an application for an order that the time within which a notice of appeal may be filed and served be enlarged. The application is made pursuant to Rule 17(3) of the Court of Appeal Rules (the Rules). The Appellant seeks leave to file a fresh notice of appeal against the decision delivered by the High Court on 25 August 2014. Pursuant to section 20(1) of the Court of Appeal Act Cap 12 (the Act) the jurisdiction

of the Court of Appeal to hear and determine the application may be exercised by a judge of the Court.

[2] The application was made by motion filed on 10 March 2015 and was supported by an affidavit sworn on 17 March 2015 by Manda Yolanda Ihaka. The application was opposed. The Respondent filed an answering affidavit sworn on 9 June 2015 by Vinay Sandeep Prakash. The Appellant filed a reply affidavit sworn on 17 September 2015. Both parties filed written submissions prior to the hearing of the application.

[3] In the judgment delivered on 25 September 2014 the High Court ordered the Appellant to pay to the Respondent the sum of $37,000.00 together with interest at the rate of 3% per annum from the date of the originating Summons being 29 October 2013 till the date of judgment within 21 days. The Appellant was also ordered to pay costs of $1500.00 to the Respondent within 21 days.

[4] The background facts may be stated briefly. By an Agreement for Lease dated 20 November 2012 the iTaukei Land Trust Board (the Board) agreed to grant to Manda Yolande Ihaka (the Appellant) a 99 years lease for residential purpose over the land described as Taukovukuca (part of) Lot 19 in the Tikina of Nadi in the Province of Ba with an area of 806 square metres (subject to survey). The commencement of the agreement was backdated to 1 January 2012. The agreement was a 6 page document setting out the lessee's covenants, schedules and special conditions.

[5] By an agreement dated 19 June 2012 the Appellant agreed to sell to the Respondent who agreed to purchase Lot 19 for the sum of $50,000.00. It was also a term of the agreement that the Appellant would provide finance for the construction of a house on the property in the sum of either $73,900.00 (in figures) or $71,900.00 (in words). The Respondent had paid $37,000 by way of installments to the Appellant under the agreement up to the start of proceedings in the High Court. The Respondent claimed repayment of the amount of $37,000.00 on the basis that (1) the sub-division was not allowed in respect of a commercial lease and (2) the consent of the Board for the sale had not been obtained in accordance with section 12 of the iTaukei Land Trust Act Cap 134. The learned Judge in the High Court rejected the first ground and found in favour of the Respondent on the second ground. The learned Judge relied on an

express covenant in the agreement between the Board and the Appellant as the basis for the decision. Reference to that covenant will be made later in this Ruling.

[6] Whether leave should be granted in the form of an enlargement of time to enable the Appellant to prosecute the appeal involves the exercise of a discretion. The factors to be considered by a court in order to ensure that the discretion is exercised in a principled manner are similar to those discussed by the Supreme Court in **NLTB –v- Khan and Another** (CBV 2 of 2013; 15 March 2013). They are (a) the length of the delay; (b) the reason for the delay; (c) whether there is a ground of merit justifying the appellant court's consideration or, where there has been substantial delay, nonetheless is there a ground that will probably succeed and (d) if time is enlarged, will the respondent be unfairly prejudiced? These are matters to be considered in the context of whether it would be just in all the circumstances to grant to refuse the application. The onus is on the applicant to establish that in all the circumstances the application should be granted.

[7] In this case the Appellant filed a timely notice of appeal on 28 October 2014. However service on the Respondent was not effected until 12 November 2014. This was outside the time limit of 42 days prescribed by Rule 16 of the Court of Appeal Rules. As there had been non-compliance with Rule 16 and therefore no valid appeal on foot, Rule 17 was of no consequence.

[8] At that point the only option for the Appellant was to apply for an enlargement of time under Rule 27 of the Rules. The present application will be considered as an application for an enlargement of time under Rule 27 rather than as an application under Rule 17(3) of the Rules.

[9] The length of the delay in this case is the period between 42 days after the judgment of the High Court (i.e. 6 November 2014) and the date of service of the present application (sometime after 10 April 2015). This is a period of at least 5 months and can reasonably be described as substantial.

[10] As for the reasons for the delay, the Court can only consider the evidence adduced by affidavit. There is no explanation for not serving the notice of appeal on the

Respondent within the time prescribed by Rule 16 of the Rules. The only explanation provided by the Appellant related to the second procedurally incorrect attempt at filing an appeal under Rule 17 of the Rules. The explanation concerned the Appellant's absence overseas during the Christmas break in 2014. That explanation, to the extent that it has any relevance to the correct procedure, is wholly unsatisfactory.

[11] Notwithstanding the conclusion that the delay is substantial and the explanation wholly unsatisfactory the exercise of the discretion also depends upon whether there is a ground of appeal that will probably succeed.

[12] In the event that an enlargement of time is granted, the supporting affidavit exhibited a document setting out the grounds of appeal upon which the Appellant intends to rely as being:

> *"1. The learned Judge erred in law and in fact in not accepting nor implying that iTaukei Land Trust Board had consented to the Sale and Purchase agreement between Plaintiff and Defendant by accepting payment of deposit of sale and purchase agreement between Plaintiff and Defendant with it.*
>
> *2. The learned Judge erred in law and in fact in finding a breach of clause 2(4) of the agreement for lease as the sale between Plaintiff and Defendant had not been effected.*
>
> *3. The learned Judge erred in law and in fact in finding that the Sale and Purchase Agreement between the Plaintiff and the Defendant was ab initio null and void because of a breach of clause 2(4) of the agreement of lease between Plaintiff and Defendant.*
>
> *4. The learned Judge erred in law and in fact in not accepting that the Sale and Purchase Agreement between Plaintiff and Defendant was to be held inchoate till consent three months before settlement."*

[13] The appeal is against the decision of the learned Judge whereby he ordered that moneys paid under the agreement between the parties be refunded. The decision was based on the finding that the agreement was ab initio null and void. That finding was in turn based on the finding of the trial Judge that, in addition to section 12 of the

iTaukei Land Trust Act Cap 134, clause 2(4) of the agreement required the prior consent of the Board to be in writing.

[14] There are only two agreements to which reference is made in the affidavit material filed in this Court. The first agreement is between the Board and the Appellant. This document is marked "*MY3*" to the affidavit sworn by the Appellant on 17 September 2015. The second agreement is between the parties. This document is marked "*B*" to the affidavit sworn by the Respondent on 4 June 2015. There is no clause 2(4) in either agreement. The relevant clause is 2(k) in the agreement between the Board (as lessor) and the Appellant (the lessee). The clause provides:

> *"2 The lessee hereby covenants with the lessor as follows:*
>
> *(k) not to alienate or deal with the land or any part thereof whether by sale, transfer, sub-lease or licence or in any other manner whatsoever without the consent in writing of the lessor first had and received."*

[15] It should be noted that the restriction imposed by clause 2(k) of the agreement is more stringent than section 12(1) of the iTaukei Land Trust Act which provides:

> *"12(1) _ _ _ it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. _ _ _ and any sale, transfer, sub lease or other unlawful alienation or dealing effected without such consent shall be null and void."*

[16] The difference between clause 2(k) and section 12 is that in clause 2(k) the consent first had and obtained must be in writing. In my judgment clause 2(k) is a valid clause in the sense that it is not inconsistent with section 12. Rather than relaxing the requirements set out in section 12 the effect of clause 2(k) is to impose a stricter condition before the dealing or the alienation can be validly effected.

[17] With the additional requirement that the prior consent of the Board must be in writing, clause 2(k) is almost identical with section 13 of the State Lands Act Cap 132. The courts have applied the same interpretation to both sections. The mere fact that an

agreement comes into existence prior to consent being obtained is not of itself a breach of section 12 (**Chalmers –v- Pardoe** [1963] 3 All ER 552. It is not the agreement itself that requires the prior consent of the Board but rather the performance of that agreement that requires prior consent. In **Jai Kissun Singh –v- Sumintra** (1970) 16 Fiji LR 165 it was said that a signed agreement held inoperative and inchoate while consent is being sought is not caught by section 12. In this case there was no material to suggest that there was ever an application for consent before the Board and nor could it be said that the agreement was *"inoperative and inchoate."* The Respondent was making payments pursuant to a schedule and an equitable interest had passed to the Respondent.

[18] In my judgment the making of payments pursuant to the schedule in the sale and purchase agreement and the acceptance of those payments by the Appellant constituted a dealing with the land by sale and required the prior consent of the Board. (See **Pralad –v- Sukh Raj** (1978) 24 Fiji LR 170. The consent that is required under both section 12 and clause 2(k) may be described as a condition precedent to performance of the agreement rather than a condition precedent to formation of the agreement.

[19] The effect of section 2(k) of the agreement is that not only must the consent be first had and received prior to performance but also the consent must be in writing.

[20] Since the evidence before the High Court did not establish that consent had been obtained in accordance with clause 2(k) I have concluded that the Appellant has not established a ground of appeal that will probably succeed. In my judgment the payment by installments of a sum of $37,000.00 without consent having been first obtained in writing constitutes sufficient performance of the agreement without prior written consent to render it unlawful and void ab initio.

[21] In my judgment Regulation 8(2) of the Native Land Trust (Leases and Licences) Regulations applies to a situation where the consent has been given by the Board. That consent in this case was required to be given in the manner prescribed by clause 2(k) of the agreement.

[22] As a result the application for an enlargement of time is refused. The Appellant is ordered to pay costs of the application to the Respondent fixed in the sum of $1800.00 within 21 days from the date of this judgment.

Orders

1. *Application for an enlargement of time is dismissed.*

2. *The Appellant is to pay costs to the Respondent in the amount of $1800.00 within 21 days of the date of this Ruling.*

COURT OF APPEAL FIJI

W. Calanchini

Hon. Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL