

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

CIVIL APPEAL NO. ABU 98 OF 2016
(High Court No. HBC 82 of 2015)

BETWEEN : KAMLESHAN SAMI MUDALIAR

Appellant

AND : PUSHPA MUDALIAR aka PUSHPA WATI DEVI

Respondent

Coram : Chandra RJA

Counsel : Mr. S. Kumar for the Appellant
Mr. E. Narayan for the Respondent

Date of Hearing : 17 May, 2017

Date of Ruling : 22 September, 2017

RULING

- [1] The Appellant filed an inter partes summons seeking leave to appeal to the Court of Appeal against the decision of the High Court delivered on 28 June 2016 under section 12(2) of the Court of Appeal Act, Rule 16 of the Court of Appeal Rules and the inherent jurisdiction of the Court. The Appellant has also sought a stay of execution and all other proceedings until the hearing and determination of the application and appeal to the Court of Appeal and to extend the time for seeking leave to appeal and giving of notice of

appeal be extended if required. In his application he set out the grounds for leave to appeal as well.

- [2] The application of the Appellant was supported by an affidavit signed on the 6th of September 2016. The Respondent has not filed any affidavit in reply.
- [3] The decision of the High Court on 28 June 2016 was in consequence of an application for Extension of Caveat No.763053 and alternatively for an interim injunction restraining the Respondent from dealing with the property which was the subject matter of the dispute.
- [4] The learned High Court Judge by his Ruling delivered on 28 June 2016 ordered the Caveat lodged against the land in dispute to be removed forthwith and that if the Respondent were to sell the said property that one third of the nett sale proceeds be deposited in Court and held in an interest bearing account until final determination of this action or until this action is discontinued by the parties or struck out by the Court.
- [5] The said decision is an interlocutory order and the Appellant sought leave to appeal the said Ruling to the Court of Appeal by Inter-Partes Summons filed on 19 July 2016 in the High Court.
- [6] The said application seeking leave to appeal was dismissed with costs by Ruling delivered on 5 September 2016 by the High Court.
- [7] The present application has been filed by the Appellant subsequent to the Ruling of the High Court refusing leave to appeal.
- [8] Both parties filed written submissions and made further oral submissions at the hearing of the application.

- [9] The Appellant has filed this application in terms of section 12(2)(f) and section 16 of the Court of Appeal Act after the application for leave to appeal to the Court of Appeal was refused by the learned High Court Judge.
- [10] The said application is on the basis that it is section 12(2)(f) which permits an applicant to seek leave to appeal to the Court of Appeal.
- [11] On the other hand the Respondent has taken up the objection that the Appellant has not followed the proper procedure to pursue his application.
- [12] The Respondent submits that the notice of appeal should have been filed in terms of section 16 within 21 days of the decision of the High Court which was delivered on 28 June 2016 refusing the application of the Appellant seeking an extension of the caveat. That the correct procedure to appeal to the Court of Appeal was to seek an extension of time by making an application to the Court of Appeal to invoke the powers of the Single Judge of the Court of Appeal under Section 20(1)(b) of the Court of Appeal Act.
- [13] The Appellant had made an application to the High Court after the learned High Court Judge had given his decision on 28 June 2016 seeking leaving to appeal, which application was refused by the learned High Court Judge by his Ruling on 5 September 2016 and the present application to the Court of Appeal was made on 6 September 2016 in terms of Section 12(2)(f) of the Court of Appeal Act. .
- [14] The question therefore is whether the Appellant has followed the correct procedure.
- [15] Two recent Rulings which deal with this position would show that the proper procedure would be to invoke the provisions of Section 20(1)(b) of the Court of Appeal Act.
- [16] In New India Assurance Company Ltd v Panach Investment Ltd [2017]FJCA 46;ABU0059.2016(12 May 2017) an application for leave to appeal was refused by the High Court and then leave to appeal was sought from the Court of Appeal pursuant to section 12(2)(f) of the Court of Appeal Act. Calanchini P in his Ruling stated:

[3] *The summons states that the application for leave to appeal is made pursuant to section 12(2)(f) of the Court of Appeal Act 1949(the Act). It is therefore made on the basis that the Ruling is an interlocutory ruling of the High Court for which leave of the court below or the Court of Appeal is required. In accordance with the requirement of Rule 62(3) of the Court of Appeal Rules (the Rules), the Appellant first sought leave to appeal from the Court below. Leave was refused by the learned High Court Judge in his Ruling delivered on 6 May 2016.*

[4] *However the correct procedure to follow when leave to appeal is refused by the court below (i.e. the High Court) is to renew the application for leave to appeal before the Court of Appeal this is the effect of Rules 26(3) which 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] *It must be noted that there is simply no right to appeal a refusal by the court below to grant leave to appeal under section 12(2)(f). The only course of action permitted under the legislation is to renew the application by way of a fresh application for leave to the Court of Appeal.* (Emphasis added)

[6] *The issues that are to be observed in an appeal are not the same as the issues that are considered when a renewed application for leave to appeal comes before a single judge of the Court under section 20(1) of the Court of Appeal Act. As a result the application for leave to appeal the Ruling of the court below refusing leave to appeal the earlier decision of the High Court delivered on 17 June 2015 is dismissed for want of jurisdiction.”*

[17] In **Shankar v FNPF Investment Ltd** [2017] FJCA 26; ABU32.2016(24 February 2017) the same position was set out in the Ruling of President Calanchini regarding an application seeking leave to appeal pursuant to section 12(2)(f) of the Court of Appeal Act.

[18] I would adopt these Rulings in deciding on the present application which is also an application seeking leave to appeal pursuant to section 12(2)(f) of the Court of Appeal Act and refuse the application of the Appellant for want of jurisdiction.

[19] In view of this position there is no necessity to consider the submissions relating to the grounds of appeal and the authorities cited.

[20] The Appellant also sought an application for stay of proceedings. As the application for leave to appeal is dismissed, there are no proceedings before this Court for which a stay could be granted.

Orders of Court

- (1) *Application for leave to appeal is dismissed.*
- (2) *Parties to bear their costs.*





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Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL