

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

**CIVIL APPEAL ABU 144 of 2016**  
**(High Court HBC 292 of 2011)**

**BETWEEN** : **AGAPE FISHING ENTERPRISES LIMITED** *Appellant*

**AND** : **HONG SEOK HWANG** *Respondent*

**Coram** : **Chandra, RJA**

**Counsel** : **Ms. N. Tikoisuva for the Appellant**  
**Mr. G. O’Driscoll for the Respondent**

**Date of Hearing** : **17 October, 2017**

**Date of Judgment** : **5 December 2017**

**RULING**

[1] The Applicant has made the present application seeking leave for enlargement of time for filing of appeal and/or appeal out of time against the judgment of the High Court dated 6<sup>th</sup> September 2016.

- [2] The Applicant has also sought an order to stay the execution of the said judgment dated 6<sup>th</sup> September 2016 until the hearing and determination of the appeal.
- [3] The Applicant has made these applications on 22<sup>nd</sup> December 2016 pursuant to Rules 20, 22 and 27 of the Court of Appeal Rules.
- [4] The application has been supported by an affidavit sworn by Suparat Adithiphyangkul aka Betty Wong 20<sup>th</sup> December 2016.
- [5] An answering affidavit sworn on 7<sup>th</sup> April 2017 by Hong Seok Hwang was filed on behalf of the Respondent.
- [6] An affidavit in reply was filed by Suparat Adithiphyangkul aka Betty Wong sworn on 21<sup>st</sup> April 2017.
- [7] The Respondent by his amended statement of claim sought a declaration that the Applicant had acted unlawfully and without any colour of right in disposing and or selling the vessel MV Oryong 81 otherwise known as Western Pacific No1, that the said vessel belonged to the Plaintiff and judgment in the sum of USD \$300,000.00 against the Applicant, judgment in the sum of \$121,500.00 for repairs and maintenance of the said vessel, interest on the judgment , post judgment interest , damages and costs.
- [8] The Applicant filed an amended defence denying the claim of the Respondent and sought a counter claim for expenses incurred in managing the vessel, post judgment interest and costs.
- [9] By judgment dated 6<sup>th</sup> September 2016 the High Court entered judgment in favour of the Respondent granting a declaration that he was the owner of the vessel "Oryong 81", that the Applicant had acted unlawfully in selling the vessel, defendant to pay a sum of US\$30,000.00 and costs in a sum of \$2500.00.

- [10] The present application was filed on 3<sup>rd</sup> January 2017. Rule 16 of the Court of Appeal Rules requires a Notice of Appeal to be filed and served within 42 days and therefore the application is clearly out of time by a considerable period of time.
- [11] Granting an application seeking leave to appeal out of time involves the exercise of discretion and the criteria to be considered for the exercise of that discretion has been spelt out by the Supreme Court in NLTB v. Ahmed Khan and Anor (unreported CBV 2 of 2013; 15 March 2013) as follows:
- (a) the length of the delay;
  - (b) the reason why the application for leave was not filed within time;
  - (c) whether there is a ground of appeal that in this case not only merits consideration by the Court of Appeal but is a ground that will probably succeed; and
  - (d) whether the Respondent will be unfairly prejudiced if time is enlarged.

#### **The length of delay**

- [12] According to the Applicant's own showing the application is sixty five days out of time. If the Applicant was desirous of appealing against the judgment, the appeal should have been filed within 42 days from the date of the judgment. The delay is fairly considerable in the present case.

#### **The reasons for the delay**

- [13] The affidavit in support sets out the reasons for the delay. The Managing Director of the Applicant, has deposed in her affidavit that as the employee who was responsible for monitoring the email account had resigned, no one was monitoring the email account. Her Solicitors used to communicate with her by email. She had come to know about the judgment only when her Solicitors had called her and informed her about the judgment

on or around the 4<sup>th</sup> of November 2016. She had thereafter consulted her business partner and her Solicitors and confirmed her instructions to the Solicitors on 28<sup>th</sup> November 2016. She had sworn the affidavit on the 20<sup>th</sup> of December 2016 and the application seeking extension of time was filed on the 22<sup>nd</sup> of December 2016.

- [14] The deponent being the Managing Director of the Applicant, being a corporate entity, has not been diligent in checking the email account of the entity after the employee who had been monitoring such account had resigned. This does not speak much of the business efficacy of the said corporate entity.
- [15] When the deponent came to know of the judgment on or about the 4<sup>th</sup> of November 2016, the 42 day period for filing the appeal had already lapsed. A further 46 had lapsed by the time the deponent signed the affidavit. The Applicant apparently has not been diligent enough to consider that her application was already delayed.
- [16] It is in these circumstances that the Applicant is seeking to have the discretion of the Court exercised regarding the application. The reasons set out in the affidavit do not satisfy this Court as being sufficient to have the discretion of the Court exercised in favour of the Applicant.

### **Merits of the Appeal**

- [17] Even if the reasons for the delay are not satisfactory, it would be necessary to consider whether the grounds of appeal adduced in the draft notice of appeal have merit. The grounds adduced are:

*"1. The learned trial judge erred in law in upholding the objection of the Counsel of the Plaintiff to the Appellant's application to submit into evidence the Affidavit of Suparat Adithiphyangkul aka Betty Wong sworn on 9 December 2011, on the ground that the documents were not disclosed to the Respondent prior to the trial, when the said Affidavit was served to the Respondent's solicitors three and a half years before trial and to which the Respondent filed an Affidavit in Answer.*

2. *The learned trial judge erred in law in holding that the Respondent was the owner of the Motor Vessel Oryong 81 ("Vessel") when at the time of the completion of the sale of the vessel to the Respondent it was still registered to Sajo Industry Co. Ltd. and not Kum Chang Industry Development Co. Ltd. ("KCIDCL") the vendor.*

3. *The learned trial judge further erred in law in assuming without any evidence in support that "Call signs" and "Call Letters" of motor vessels meant the same thing.*

4. *The learned trial Judge further erred in fact and law by not attributing the proper weight to the following:*

*i. That the Respondent did not know that the Vessel had changed name to "Western Pacific No.1" but further contradicted himself when he said he saw the same vessel being cut up and reported the matter to police.*

*ii. That the Certificate of Vessel's Nationality showed tempering of the document by the Respondent as he claimed that he was not the owner of the vessel at that time but his name is on the said certificate as tendered by him.*

*iii. The conflicting information provided by the Certificate of Nationality and Certificate of deregistration tendered by the Respondent has having two different registered owners for the same period."*

[18] The Applicant has laid emphasis on the first ground of appeal. The Applicant has taken up the position that the trial judge erred in law in upholding the objection of the Counsel for the Respondent regarding the admission of the affidavit of the Applicant which had been filed earlier and to which the Respondent had responded with an answer.

[19] The said affidavit with the documents contained within it had been filed by the Applicant for a different issue, which was to strike out the Respondent's claim, and had not been formally before Court at the hearing. The Applicant had failed to file a list of documents in time and had made an application to produce documents attached to the Applicant's

application to strike out the plaintiff's statement of claim at the commencement of the cross-examination of the Respondent's first witness. Counsel for the Respondent had objected to same and the learned High Court Judge had refused the application of the Applicant, on the basis that the documents were not disclosed to the Respondent prior to the hearing.

- [20] It is apparent that the Applicant had not filed a list of documents prior to the hearing and had tried to circumvent that by stating that the documents that were being relied upon had been disclosed to the Respondent earlier in the affidavit of the Applicant to have the Respondent's claim struck out.
- [21] This again goes to show the lack of diligence on the part of the Applicant regarding the case and the learned High Court Judge cannot be faulted for refusing the application of the Applicant to produce the documents which were not formally before Court. The Applicant has to take the blame for the lapse and therefore I do not see any merit in the first ground of appeal.
- [22] The written submission filed on behalf of the Applicant highlighted only this first ground of appeal, although three other grounds of appeal were urged.
- [23] The other three grounds of appeal relate to questions of fact as the learned High Court Judge has considered the evidence before him and arrived at his conclusion. I do not see any merit in these grounds.

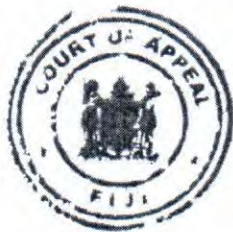
#### **Prejudice to the Respondent**

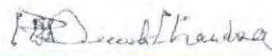
- [24] The Applicant has submitted that the Respondent will not suffer any prejudiced as the vessel in question had been sold for scrap metal and that the status quo of the Respondent remains the same although there would be a delay in enjoying the fruits of the judgment. On that basis the Applicant has submitted the prejudice suffered by the Applicant outweighs the prejudice to the Respondent.

- [25] Even though it is only the fruits of the judgment that the Respondent would be looking forward to enjoy, the delay in being able to do so would prejudice him. Furthermore, if the matter ends with this application, it would be beneficial to both parties as the litigation between them on this matter comes to an end which is also something that litigants would aspire to achieve.
- [26] In those circumstances it cannot be said that the Respondent will not be prejudiced if extension of time is granted to the Applicant.
- [27] Although in the application of the Application a stay was sought, it was not pursued and therefore the granting of a stay does not arise.
- [28] For the reasons set out above I refuse the application of the Applicant for extension of time and the Applicant shall pay \$2000.00 as costs to the Respondent.

***Orders of Court:***

- (1) The application for extension of time is refused.*
- (2) The application for a stay of execution of the judgment is refused.*
- (3) The Applicant shall pay \$2000.00 as costs to the Respondent.*



  
\_\_\_\_\_  
**Hon. Justice Suresh Chandra**  
**RESIDENT JUSTICE OF APPEAL**