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

CIVIL APPEAL ABU 94 of 2016
(High Court HBC 472 of 2007)

BETWEEN : **GULF SEAFOOD (FIJI) LIMITED**

Appellant

AND : **iTAUKEI LAND TRUST BOARD**

Respondent

Coram : **Calanchini P**

Counsel : **Mr S Inoke for the Appellant**
Ms L Komatai for the Respondent

Date of Hearing : **15 November 2017**

Date of Ruling : **20 December 2017**

RULING

[1] This is an application for an enlargement of time to file a notice of appeal against the judgment of the High Court delivered on 13 April 2016. The High Court dismissed the Appellant's claim and ordered that the Appellant pay the sum of $103,530.22 on the Respondent's counterclaim. The Appellant was ordered to pay costs to the Respondent fixed in the amount of $3,500.00.

[2] The application was made by an undated and unsigned summons filed on 12 August 2016 and supported by an affidavit sworn on 2 August 2016 by Roger Black. That affidavit does not comply with Order 41 of the High Court Rules in that it does not state the address of the deponent other than a reference to "*Brisbane, Australia.*" The application was opposed. The respondent filed an answering affidavit sworn on 17 February 2017 by Semi Senikuraciri. Both parties filed written submissions prior to the hearing of the application.

[3] Although the summons states that the application is made under section 12 of the Court of Appeal Act 1949 (the Act) the power of the Court of Appeal to extend time exists by virtue of section 13 of the Act which provides that the Court of Appeal has all the power, authority and jurisdiction of the High Court. Section 20(1) of the Act provides that a judge of the Court of Appeal may exercise the power of the Court to extend the time within which a notice of appeal may be given.

[4] Before turning to the principles that are considered in such applications, it is necessary to briefly consider the unfortunate procedural history of the matter.

[5] The High Court judgment delivered on 13 April 2016 was a final judgment. A notice of appeal was filed and served on 12 May 2016, both within the time of 42 days prescribed by Rule 16 of the Court of Appeal Rules (the Rules). It was at that date that the requirements of Rule 17(1) were activated. Rule 17(1) states:

> *"17(1) The Appellant must:*
> *(a) Within 7 days after service of the notice of appeal:*
> *(i) file a copy endorsed with a certificate of the date the notice was served; and*
> *(ii) apply to the Registrar to fix the amount of the security to be given by the Appellant for the prosecution of the appeal, and or the payment of all such costs as may be ordered to be paid;*

(b) within such time as the Registrar directs, being not less than 14 days and not more than 28 days, deposit with the Registrar the sum fixed as security for costs."

[6] Although the Appellant has filed an affidavit of service in purported compliance with Rule 17(1)(a)(1) there is no copy of the notice of appeal with the necessary endorsement exhibited to the affidavit. Once again the affidavit does not comply with Order 41 in that the deponent has not stated his address in the proper form. *"Samabula, Suva"* is not sufficient.

[7] However, more significantly, the Appellant has not complied with Rule 17(1)(a)(ii) in that the summons for an order that an amount be fixed as security for costs was not filed until 23 May 2016. The summons was required to have been filed by 19 May 2016. The consequences of not complying with Rule 17(1)(a) are set out in Rule 17(2) which provides that the appeal is deemed to have been abandoned.

[8] Although there had been non-compliance with Rule 17(1)(a) the Registry issued the summons which was made returnable before the Registrar on 7 June 2016. On that day the Registrar ordered the Appellant to pay $3,000.00 as security for costs to be paid to the Registrar with 28 days from that date. The amount of $3,000.00 was due and payable by 5 July 2016. The material in the files indicates that there was confusion both in the minds of the Registry staff and the legal practitioners acting for the Appellant as to the manner in which time is calculated to run from the date of the Registrar's order. Once again, in accordance with section 13 of the Act, Order 3 of the High Court Rules determines the issue. The effect of Order 3 Rule 2(2) is that the period of 28 days commenced immediately after 7 June 2016, that is on 8 June 2016 and continued to 5 July 2016 being 28 days. Payment could have been made at any time during business hours on 5 July 2016.

[9] Despite that confusion the problem for the appellant is that by virtue of Rule 17(1)(a)(ii) and Rule 17(2) the appeal was deemed to have been abandoned on and from 19 May 2016. The failure to comply with Rule 17(1)(a)(ii) was not cured or waived by the

Registry accepting and issuing the summons on 23 May 2016. The result for the appellant was that it had a further period of 42 days from 19 May 2016 to file and serve a fresh notice of appeal under Rule 17(2). That should have been done no later than 30 June 2016. The appellant did not take advantage of the second chance given under Rule 17(2) and failed to file and serve a fresh notice of appeal by that date. That left the appellant with Rule 17(3) which states that:

> *"Except with the leave of the Court of Appeal no appeal may be filed after the expiration of time specified in paragraph (2)."*

[10] The application for an extension of time filed on 12 August 2016 and served on 31 August 2016 will be taken as the application required under Rule 17(3).

[11] The principles upon which an enlargement of time may be granted are well settled and well known. They were considered by the Supreme Court in **NLTB (now iTLTB) –v- Ahmed Khan and Another** (CBV 2 of 2013; 15 March 2013). In order to ensure that the discretion is exercised in a principled manner the Court considers (a) the length of the delay, (b) the reasons for the delay, (c) whether there is a ground of merit justifying the appellate 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. The discretion should be exercised in a manner that re-inforces the importance of compliance with the rules of Court and the need to bring finality to litigation (see **McCaig –v- Abhi Manu** CBV 2 of 2012; 24 April 2013).

[12] The length of delay from the date of the deemed abandonment being 19 May up to the date the application for an enlargement of time was served being 31 August 2016 is a period of almost 3½ months.

[13] The only explanation for that delay is the failure on the part of the appellant to comprehend the effect of Rules 17(1) and 17(2) of the Court of Appeal Rules.

[14] The third factor is an assessment of the chances of the appeal succeeding. This does not involve a detailed consideration of the grounds of appeal nor does it amount to an attempt at this stage to determine the appeal. However it is necessary to assess the merits of the appeal in order to determine whether there is sufficient basis to excuse the delay and to allow the appeal to proceed to the Full Court. Unfortunately the affidavit in support of the application does not annex a proposed notice and grounds of appeal upon which the appellant would rely in the event that an enlargement of time is granted. There is a document attached to the appellant's submissions that purports to be a notice and grounds of appeal dated 10 May 2016. This is obviously a copy of the timely notice of appeal that was deemed to have been abandoned under Rule 17(2) due to non-compliance with Rule 17(1)(a)(ii). Furthermore, neither party has adequately addressed this matter in their written submissions. The appellant made no reference to the merits of the appeal in written submissions while the respondent makes a passing reference in paragraph 25 of its written submissions. In oral submissions both parties addressed the principal issue raised by the appeal.

[15] The dispute between the parties related to an agreement to lease iTaukei land. The agreement was between the appellant and the respondent on behalf of the traditional land owing unit in respect of land in the province of Serua. It was not disputed that the land the subject matter of the agreement to lease was reserved land. The High Court found as a fact that the appellant was aware that the land was reserved iTaukei land and that the possibility of de-reservation had been discussed by the parties before entering into the agreement to lease. The Court also concluded that the appellant's director, Mr Black, was or ought to have been aware of the status of reserved iTaukei land in Fiji. The Court rejected the contention that the land should have been de-reserved by the respondent before the agreement to lease was issued and that this constituted negligence on the part of the respondent. The learned Judge rejected the contention that it was necessary for reserved iTaukei land to be de-reserved under section 17 of the Act before an agreement to lease was made by the parties. Furthermore the Judge stated that de-reservation could only be effected under section 17 after the requirements specified in the agreement to lease under Regulation 12 of the Regulations had been satisfied. The Court concluded

that the agreement to lease entered into by the Appellant and the Respondent was not contrary to sections 15 and 16 nor was it contrary to Regulation 12. There was no negligence on the part of the Respondent. The Appellant's project failed on account of its poor relationship with the iTaukei land owners.

[16] The submissions filed by the Appellant set out as an annexure the grounds of appeal upon which the Appellant proposes to rely in the event that an enlargement of time were to be granted. There are 9 proposed grounds of appeal which raise one central issue concerning the power of the Respondent to enter into an agreement to lease iTaukei land that was at the time of the agreement reserved land.

[17] It does seem to me that there are two separate issues involved in considering the appeal. The first issue is the power of the Respondent to enter into a lease (and before that an agreement to lease) and the power of the Respondent to set aside iTaukei land as reserved land and to subsequently exclude land from iTaukei reserved land.

[18] The first issue is regulated by sections 4 and 8-10 and Regulations 12 of the legislation. The second issue is dealt with in sections 15-18 of the Act. The two sets of provisions represent different powers and obligations of the Respondent that should be exercised independently of each other.

[19] However one matter is clear beyond doubt. The power to enter into a lease and the power to enter into an agreement to lease are both vested in the Respondent. Similarly the power to set aside iTaukei Land under section 15 and the power to exclude iTaukei land under section 17 are both vested in the Respondent subject in the latter case to the consent of the land owners.

[20] At this stage it is appropriate to indicate that there is an extremely useful and informative analysis of these provisions in the judgment of Jitoko J in **Mataitoga –v- Native Land Trust Board** [2007] FJHC 147, HBC 315 of 2003; 18 May 2007.

[21] It is quite clear under section 16(2) of the Act that a lease of reserved land may only be granted to iTaukei with the consent of iTaukei owners of the reserved land. The Appellant was not iTaukei. I see no reason why the prohibition does not as a matter of logic extend to entering into an agreement to lease iTaukei reserved land. I am therefore satisfied that the appeal raises a significant issue that meets the threshold requirement for granting an enlargement of time.

[22] On the material before me I am not satisfied that the Respondent will be unfairly prejudiced in the event that an enlargement of time is granted. However the Respondent should not be penalized by the Appellant's failure to comply with the Rules and shold as a result be awarded costs.

Orders:

1. *Application for enlargement of time granted.*
2. *Appellant to file and serve a notice of appeal within 28 days from the date of this Ruling.*
3. *Appeal to proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules thereafter.*
4. *Appellant to pay Respondent's costs summarily fixed in the amount of $2,000.00 within 28 days from today.*
5. *In default of orders 2 and 4, the appeal is to be marked dismissed.*

Hon Mr Justice Calanchini
President, Court of Appeal