

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

CIVIL APPEAL NO. ABU 126 of 2016
(High Court HBC 458 of 1993)

BETWEEN : 1. **RESOLUTION TRUST CORPORATION**
2. **THE CADLE COMPANY**

Appellants

AND : 1. **LEILANI K. BORTELS & LARRY L. BORTLES**
2. **A. MITCHELL GAY**
3. **ALAN C. BEALL**

Respondents

Coram : Chandra RJA

Counsel : Ms. P. Low for the Appellants
Dr . S. Shameem with Ms. D. Gandhi for the 2nd Respondent

Date of Hearing : 15 February 2018

Date of Ruling : 5 July 2018

RULING

- [1] This is an application for extension of time for leave to appeal the decision of the High Court at Suva delivered on 27th October 2016 which was in respect of a notice of motion for an order of Committal against the 2nd Respondent for contempt of that Court by the Breach of the injunction granted on 25th August 1993.
- [2] The first and second Appellants sought leave to appeal the said interlocutory decision by summons filed on 17th November 2016 which is a timely appeal but filed in the Court of Appeal Registry.
- [3] When the matter was mentioned on 9th December 2016, directions were given by Court to the first named Respondent to file and serve answering affidavit, the Appellants to file and serve a reply affidavit and both parties to file concurrent written submissions.
- [4] When the matter was mentioned on 3rd March 2017 the Appellant was directed to file and serve any necessary reply affidavit and concurrent submissions.
- [5] On 28th April 2017 the Appellants were directed to file and serve a summons for enlargement of time application together with supporting affidavit as the original notice of appeal had been filed in the wrong Court, without first having recourse to the High Court in terms of Rule 26(3) of the Court of Appeal Rules.
- [6] After a summons was filed for enlargement of time by the Appellants on 20th June 2017, the application was taken up for hearing after both parties had filed written submissions.
- [7] The Appellant were seeking to appeal the decision of the High Court delivered on 27th October 2016, which dismissed the application made by the Appellant for committal in respect of an injunction granted on 25th August 1993.

[8] The grounds of appeal set out in the application for extension of time for leave are as follows:

- “1. *The Learned Judge erred in law in finding that the Mareva Injunction granted by the High Court of Fiji against the First Respondents on 25 August 1993 and extended on 14 September 1994 (“Order”) did not extend to property acquired by the second named Respondent (second named First Defendant) after the Order was made.*
2. *The Learned Judge erred in law and/or fact by finding that the second named First Respondent (Mr Bortles) did not breach the Order and is not in contempt of court when he disposed of eleven (11) properties to various third parties.”*

[9] In an application seeking enlargement of time for leave to appeal, the following principles are considered for granting of leave. The principles which have been followed regularly in such applications are set out in the Supreme Court decision of **NLTB v Ahmed Khan and Another** (CBV 2 of 203; 5 March 2013 per Gates CJ) as follows:

- (a) The length of the delay;
- (b) The reasons for the delay;
- (c) Whether there is ground of merit justifying the appellate court’s consideration or, where there has been a substantial delay, nonetheless is there a ground that will probably succeed and
- (d) If time is enlarged, will the Respondent be unfairly prejudiced.

[10] Considering the above principles, the delay in making the application seeking enlargement of time was filed on the 20th of June 2017. The decision challenged by the Appellant was delivered on the 27th of October 2016. The delay in making the application is therefore over six months.

[11] The reasons given by the Appellant for the delay is that in fact an application was made to appeal the decision within time but inadvertently it was filed in the wrong Court, whereas it should have been filed in the Court of first instance namely the High Court.

[12] The Appellants have tendered their apology for their inadvertent mistake. The Solicitors had not advised themselves correctly regarding the necessary procedure for filing an appeal and therefore it is not the fault of the Appellants but that of the Solicitors which is not an excusable reason.

[13] However, even if the reasons for the delay are not excusable it has been the practice to grant leave if there are merits in the application when the grounds of appeal are considered.

[14] The application for committal sought by the Appellant was in relation to the injunction granted by Fatiaki J on 25 August 1993 which read as follows:

*“(The 1st Defendants and each of them) “is restrained and an injunction is granted restraining them and each of them until further order whether by themselves their servants or agents or otherwise howsoever from transferring, dealing with, charging, mortgaging, assigning, disposing of (otherwise than to the Plaintiff or with prior written consent of the Plaintiff’s Solicitors) or removing from the jurisdiction **any of their or each of their property or monies or assets including property held by third party entities over which the Defendants or each of them have ownership and or control within the jurisdiction of this Honourable Court including but not limited to the properties being described as Certificate of Title 6683 and Native Lease 8720.”** (emphasis added)*

[15] The learned High Court Judge considered the said injunction to apply to properties that the Respondent had at that time namely 25 August 1993.

[16] The Appellants had listed out 11 properties said to have belonged to the Respondent which they alleged he had disposed of after the injunction and that formed the basis of their application for committal.

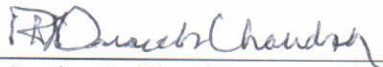
[17] The learned High Court Judge had concluded that of the 11 properties only 1 was covered by the injunction as it had been transferred to the Respondent on 4 May 1993 whereas the other properties were acquired after 25th May 1993.

- [18] The learned High Court Judge also concluded that the property covered by the injunction cannot be sold until the conclusion of the action although the Appellants had made out that the Respondent was attempting to sell the property.
- [19] The learned High Court Judge had refused the application seeking committal as the Appellants had failed to make out a case for committal.
- [20] The grounds of appeal were based on the question whether the learned High Court Judge erred in arriving at the conclusion that the injunction covered only properties owned by the Respondent at the time of the injunction.
- [21] On a perusal of the decision of the learned High Court Judge I am not convinced that the grounds of appeal urged by the Appellant have any merit.
- [22] If leave is granted it would prejudice the Respondent as the Respondent would be made to undergo further proceedings on this matter.
- [23] For the above reasons the application for extension of time for leave to appeal is refused and the parties shall bear their own costs.

Orders of Court:

- (1) *Application for extension of time for leave to appeal is refused;*
- (2) *That parties shall bear their own costs.*




Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL