

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

CIVIL APPEAL NO. ABU 129 of 2016
(High Court HBC 458 of 1993)

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

Appellants

AND : 1. RESOLUTION TRUST CORPORATION
2. THE CADLE COMPANY

Respondents

Coram : Chandra RJA

Counsel : Dr . S. Shameem with Ms. D. Gandhi for the 1st Appellant
Ms. P. Low for the Respondents

Date of Hearing : 1 May 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 1st November 2016 which was in respect of a summons to register a Court Order.
- [2] The first Appellant sought leave to appeal the said interlocutory decision by summons filed on 21st 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 Respondent to file and serve answering affidavit, the Appellant 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 Respondent was directed to file and serve any necessary affidavit and concurrent submissions.
- [5] On 28th April 2017 the Appellant was 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 26th of May 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 1st November 2016, entitling the Respondent to register a Court Order.
- [8] The grounds of appeal set out in the application for extension of time for leave are as follows:
The learned Judge erred in law and in fact:

- a) When he stated that both Judge Fatiaki and Master Rajasinghe had found that the Defendant Larry Bortles was the owner of CT 6684;
- b) When he stated that counsel for the Defendant had said that the Ruling of Master Rajasinghe had set aside the summary judgment of J Udit of 2009 when her submissions stated clearly that it was the pertinent part of the summary judgment that had been set aside, a matter which was also clarified specifically in open court during oral submissions.
- c) When he allowed the Summary Judgment of J Udit to be re-registered on CT 6684.
- d) By declaring ownership of CT 6684 when this matter was still being challenged by other claimants before the Court of Appeal and had not yet been finally determined by a court of law.
- e) By stating that the Constitutional provisions on property rights did not assist the Defendant.
- f) When he summarily refused to entertain substantive submission on the application of the Constitution to property rights in Fiji as requested by counsel for the Second named First Appellant.

[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 2013; 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 26th of May 2017. The decision challenged by the

Appellant was delivered on the 1st of November 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 1st ground of appeal is that the learned High Court Judge had erred when he had stated that Judge Fatiaki and Master Rajasinghe had found that Bortles was the owner of CT 6684. A perusal of the Title Register would justify such a conclusion, which is the argument that was put forward by the Respondents. However, it has been argued by the Appellant that, Justice Fatiaki, who granted the injunction, had not conclusively stated that the Appellant was the owner, and that Master Rajasinghe too had not conclusively stated so. In fact Master Rajasinghe in his ruling has stated thus:

"50. Though, Justice Fatiaki did not determine the ownership of the property, in fact, this observation has noted the deletion of the partnership's name which somewhat conjunctive with the contention of Mr. Bortles that he was advised by his lawyers to purchase the property under his name. Indeed this issue needs to be determined in a proper trial giving the parties an opportunity to examine and cross examine their respective witnesses. In view of these findings, I am satisfied that the defendants have successfully established that they have a defence with a real prospect of success or with some degree of conviction in respect of the third order granted in the Summary Judgment."

In fact what Master Rajasinghe has stated is a re-echoing of what Justice Fatiaki had stated in his judgment regarding the granting of the injunction, that ownership cannot be determined on mere affidavit evidence. In view of this position as the third order in Master Udit's Ruling affects the title of the property, there is merit in this ground of appeal.

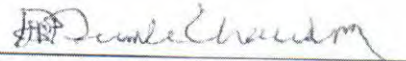
- [15] There is merit in the second and third grounds of appeal. What was sought to be registered was the summary judgment of Master Udit which had three orders and an order regarding costs. The Respondents have submitted that it is merely a money order which was sought to be registered against the title of Bortles. Master Rajasinghe in the application made by the Appellant and another to have the said summary judgment set aside, ordered that the third order in the summary judgment of Master Udit be set aside. The learned High Court Judge had not adverted to this position in his decision.
- [16] The fourth ground of appeal is relevant in dealing with ground 1 and therefore it needs consideration.
- [17] The 5th and 6th grounds are on the basis of the Constitutional provisions which I will not deal with as I have already considered that there are merits in the other grounds of appeal.
- [18] Granting of leave would delay the conclusion of this matter which on the face of it would prejudice the Respondent. But since the appeal would deal with grounds of merit such a delay cannot be avoided.
- [19] In the circumstances of this case, no costs would be awarded and the parties shall bear their own costs.

Orders of Court:

- (1) Application for extension of time to file an appeal is granted;*

(2) *The Appellant to file and serve a notice of appeal setting out the grounds of appeal within 21 days of this Ruling.*

(3) *The parties shall bear their own costs.*



Hon. Justice S. Chandra
RESIDENT JUSTICE OF APPEAL

