

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

CIVIL APPEAL ABU 99 of 2017  
(High Court HBC 79 of 2006L)

BETWEEN : FRED WEHREBERG

*Appellant*

AND : SEKAIA SULUKA  
TAUVOLI  
EPARAMA  
COMMISSIONER OF POLICE  
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

*Respondents*

Coram : Calanchini P

Counsel : Appellant in person  
Mr J Pickering for the Respondents

Date of Hearing : 21 May 2018

Date of Ruling : 6 July 2018

RULING

[1] The applications before the Court have been filed by the appellant. Although there is some overlapping in terms of the orders sought it is proposed to consider the applications in the order in which they were filed.

[2] The first application was made by summons dated 16 August 2017. In that summons the appellant applied for the following orders:

"1. Leave be granted to the Appellant to appeal the Orders in paragraph 34 (c), (d) and (e) and the conclusions in paragraph 15, 16, 25 to 31 of the Interlocutory Ruling of the Honourable Mr Justice Brito-Mutunayagam delivered at the Suva High Court on 27.2.2017, in which the learned Judge declined the Plaintiff's/Appellant's three interlocutory applications namely:

(a) Notice of Motion filed on 25.11.2014 seeking leave to join the Plaintiff's/Appellant's wife Mrs Walburga Wehrenberg as 2<sup>nd</sup> Plaintiff, pursuant to Order 15 Rule 6(6) (b) of the High Court Rules 1988.

(b) Notice of Motion filed on 13.1.2015 seeking leave to subpoena Mr Dennis Narayan, the former Court Clerk, to give evidence in regards to the verbal order made by Justice Wickramasinghe on 1.7.2011 that the Plaintiff/ Appellant and his wife consolidate the 5 affidavits into one combined affidavit (evidence in chief).

(c) Notice of Motion filed on 10.5.2016 seeking leave to use Plaintiff's/Appellants combined and supplementary affidavits which were ordered by the Court for trial on 1.7.2011 and 6.3.2012 containing however references to UN Conventions, the Constitution and the law, pursuant to Order 41 Rule 4 of the High Court Rules 1988.

2. Leave be granted to the Appellant to appeal the order in paragraph 31 (b) of the Interlocutory Ruling of the Honourable Mr Justice Brito-Mutunayagam delivered at the Suva High Court on 3.8.2017, in which the learned Judge ordered that the Appellant pays the Respondents/Defendants costs of \$750.00."

[3] The application was supported by an affidavit sworn on 10 August 2017 by Fred Wehrenberg. The application was opposed by the Respondents. An answering affidavit sworn on 29 September 2017 by Sevoki Tuiwaqa was filed on behalf of the respondents. The appellant filed a supplementary supporting affidavit sworn on 29 September 2017 by Fred Wehrenberg. A further answering affidavit sworn on 18 October 2017 by Sevoki Tuiwaqa was filed on behalf of the respondents. Both parties subsequently filed written submissions prior to the hearing on 21 May 2018.

[4] The application is essentially a renewed application for leave to appeal the interlocutory judgment of the High Court delivered on 27 February 2017. The orders of the High Court appear in paragraph 34 of that judgment:

*“(a) I decline the defendants’ application to strike out the affidavits filed by the plaintiff.*

*(b) I direct that all witnesses be available to give evidence at the trial.*

*(c) The plaintiff’s notice of motion filed on 10 May 2016 is declined.*

*(d) The plaintiff’s application to join his wife as a plaintiff is declined.*

*(e) The plaintiff’s application to subpoena the former court clerk is declined.*

*(f) The defendants shall pay the plaintiff’s costs in the sum of \$500.00.*

*(g) I order costs in the cause in respect of the four applications I have determined.*

*(h) This case will be called before the Master of the High Court of Labasa on 3 March 2017 at 9.00am to fix for hearing.”*

[5] Being interlocutory orders, leave to appeal to the Court of Appeal was required from either the court below (i.e. the High Court) or from the Court of Appeal pursuant to section 12(2) of the Court of Appeal Act 1949 (the Act). Where the court below and the Court of Appeal enjoy concurrent jurisdiction in respect of an application, the application must first be made to the court below under Rule 26(3) of the Court of Appeal Rules (the Rules). In the event that the court below (the High Court) refuses the application, it may then be renewed in the Court of Appeal. Pursuant to section 20(1) of the Act a judge of the Court of Appeal may exercise the Court’s power to grant leave to appeal and to grant a stay of proceedings to prevent prejudice to the claims of a party pending the appeal.

[6] In the present case, an application for leave to appeal was made in the court below. The application was refused by the High Court in a ruling delivered on 3 August 2017 and the

appellant was ordered to pay \$750.00 costs to the respondents. It appears not to be in dispute that the application in the High Court for leave to appeal had been filed and served within the 21 days for doing so under Rule 16 of the Court of Appeal Rules. The appellant has acted promptly when he filed his renewed application for leave to appeal in the Court of Appeal on 16 August 2017.

- [7] At the hearing the appellant confirmed that he is seeking leave to appeal only three of the orders that are listed in paragraph 34 of the interlocutory judgment dated 27 February 2017. The appellant renews his application for leave to appeal (i) the refusal to grant the orders sought in his motion filed in the High Court on 10 May 2016, (ii) the refusal of the application for the appellant's wife to be added (joined) as a plaintiff and (iii) the refusal of the application to allow the appellant to subpoena the former court clerk.
- [8] Unfortunately, so far as I am able to determine, there is no copy of the motion filed on 10 May 2016 in the voluminous material that has been filed by the parties. However reference is made to the motion by the learned High Court judge in his ruling dated 27 February 2016, the subject of the present renewed application for leave to appeal. In that motion the appellant sought leave (1) to use at the trial combined and supplementary affidavits of the plaintiff and Walburga Wehrenberg which refer to United Nations Conventions, the 1997 Constitution and the law, (2) to join his wife as the second plaintiff and (3) to subpoena a former court clerk to give evidence in regard to proceedings of the High Court. It will be noted that two of the orders sought in the motion which were refused by the learned High Court Judge are the subject of the present application. The only additional issue raised in the motion was the application to rely on the combined and supplementary affidavits.
- [9] In the same summons the appellant seeks an order for a stay of the payment of \$750.00 as costs ordered by the High Court in its judgment dated 3 August 2017 refusing leave to appeal the orders made in the judgment dated 27 February 2017.

[10] In a second summons filed on 23 February 2018 the appellant applied for an order that (1) the order made by the High Court in its judgment dated 3 August 2017 to fix a date for trial of the substantive matter be stayed until the determination of this appeal, (2) the order made by the High Court in its judgment dated 3 August 2017 ordering the appellant to pay costs of \$750.00 be stayed until the final determination of this appeal and (3) leave to appeal and stay of execution be granted in respect of the orders made by the Hon Mr Justice Amaratunga in his Ruling dated 16 February 2018 that costs of the application for stay of execution be dismissed with costs of \$500.00 to be paid by the appellant.

[11] It need only be noted that the second order sought in this summons is already the subject of the present application and that the third order sought relates to a different ruling which is not the subject of the present application being a renewed application for leave to appeal the judgment and orders dated 27 February 2017.

[12] In summary then the issues before the Court are whether the appellant should be granted leave to appeal the following interlocutory orders:

- (a) the refusal to grant leave to join the wife of the appellant as a plaintiff in High Court action HBC 79 of 2006.
- (b) the refusal to allow the appellant to use/rely on the combined and supplementary affidavit sworn by the appellant and his wife in High Court action HBC 79 of 2006.
- (c) the refusal to allow the appellant to subpoena a former court clerk to give evidence at the trial in action HBC 79 of 2006;

and whether the Court should order:

- (d) a stay of the order for costs in the amount of \$750.00 ordered by the High Court in its judgment dated 3 August 2017 refusing leave to appeal, and
- (e) a stay of the trial of the substantive relief claimed until the determination of this appeal.

- [13] At the hearing of the application Counsel for the Respondent accepted that there was sufficient material before the Court to conclude and the appellant should be granted leave to appeal to the Full Court on the issue of the use of the combined and supplementary affidavits sworn by the appellant and his wife. I agree and as a result leave to appeal that interlocutory order is granted.
- [14] It was accepted by the appellant that if he was successful before the Full Court on that ground then it would not be necessary for him to subpoena the court clerk who was apparently at the relevant time the clerk to the High Court Judges who had indicated that the appellant could rely on combined and supplementary affidavits.
- [15] Pursuant to section 20(1) of the Act a judge of the Court of Appeal may grant a stay of any order pending the appeal. It is appropriate to grant a stay in respect of the costs order made against the appellant pending the appeal to the Full Court. A stay is also granted in respect of the fixing of a trial date for the determination of the substantive relief until the hearing of the appeal to the Full Court.
- [16] The only aspect of the application that raises some concern is the application for joinder. The proceedings in the form of a High Court civil action were commenced in 2006. It is accepted that the application for joinder was made after the limitation period had expired. Therefore the application by the appellant to join his wife as a plaintiff is required to be determined under Order 15 Rules 6(5) and 6(6) of the High Court Rules. The learned High Court Judge concluded that the appellant's wife was not a necessary party for the determination of his claims which were personal and not vested jointly with her.
- [17] Whether leave to appeal an interlocutory order should be granted is generally considered by asking whether in all the circumstances the judgment of the High Court raised sufficient doubt to warrant it being considered by the Court of Appeal and whether it would be unjust if leave were refused in the event that the interlocutory order was wrong. It is clear from the authorities that the question of injustice resulting from the order appealed from is a necessary factor to be taken into account. In my judgment the result

of the interlocutory order is to deprive the appellant's wife of claiming relief in similar circumstances to that of the appellant. Under the circumstances it is appropriate to grant leave to appeal to enable the Court of Appeal to properly consider the application and scope of Order 15 Rules 6(5) and 6(6) of the High Court Rules.

Orders:

1. *Leave to appeal to the Full Court is granted on the issues of:*
  - a) *joinder*
  - b) *use of supplementary and combined affidavits*
  - c) *the issue of a subpoena on the court clerk*
  
2. *Stay pending appeal is granted in relation to:*
  - a) *Costs orders made on 27 February and 3 August 2017*
  - b) *The fixing of a trial date for the hearing of substantive relief*
  
3. *Appellant is to file and serve a notice of appeal within 14 days from the date of this Ruling and thereafter the appeal will proceed in accordance with Rules 17 and 18 of the Court of Appeal Rules.*
  
4. *Each party pay their own costs of this application.*



*W. Calanchini*  
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Hon Mr Justice W. D. Calanchini  
**PRESIDENT, COURT OF APPEAL**