

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

CIVIL APPEAL ABU 106 OF 2017
(High Court HBC 219 of 2017)

BETWEEN : **TOMU MAIRI**

Appellant

AND : **B D LAKSHMAN AND SONS (PROPERTIES) LIMITED**

Respondent

Coram : **Calanchini P**

Counsel : **Mr K Chambers for the Appellant**
Ms N Choo for the Respondent

Date of Hearing : **11 December 2017**

Date of Ruling : **31 January 2018**

RULING

[1] On 23 August 2017 the appellant filed a timely notice of appeal seeking the following orders:

"A. That the order numbered 1, made by His Lordship Mr Justice Amaratunga on 3 August 2017 striking out the Appellant's inter

partes summons for interim injunction shall be set aside and rescinded.

- B. *That the respondent by itself or through its servants, employees, agents, invitees or otherwise howsoever shall be restrained from obstructing or otherwise howsoever interfering with the appellant and the appellant's family in their possession, occupation and use of the land known as Laqeri (part of) and Naivakoroko in CTs 2494 and 2495 ("the land") until final determination of the High Court action.*
- C. *That the respondent shall by itself or through its servants, employees, agents or invitees or otherwise howsoever be restrained from crossing, passing over or otherwise howsoever using the land until final determination of the High Court Action."*

[2] Although the appeal was in respect of an interlocutory application for interim relief, leave was not required by virtue of section 12(2)(f)(ii) of the Court of Appeal Act 1949 (the Act). The appellant had otherwise complied with the requirements of Rule 17(1)(a) of the Court of Appeal Rules. When the Summons to fix security for costs came before the Registrar on 12 September 2017 the parties were directed to file a further application before a judge of the Court. Accordingly the appellant filed a summons for directions returnable before a judge of the Court of Appeal on 6 October 2017. The issue raised by the summons concerned the correct interpretation of orders previously made by this Court on 1 September 2017.

[3] When the summons came on for hearing the appellant applied to withdraw the present appeal. Although the respondent did not object to the application, counsel sought costs from the appellant. That application for costs was opposed and as a result the parties were directed to file written submissions on the issue of costs.

[4] The written submissions filed by both parties examine in some detail the proceedings before the High Court on 3 August 2017. The significant point is that if the summons filed on 28 July 2017 by the Appellant in the High Court was withdrawn on 3 August 2017 at the request of the appellant then the subsequent appeal filed in this Court by the

appellant challenging the order effectively granting the appellant's application is of no avail.

- [5] The transcript of the proceedings that is annex A to the appellant's submission and to which the respondent raises no objection clearly states the following towards the end of the page:

"Chambers: No, My Lord, I think I agree with my friend that we need to withdraw the summons."

- [6] Pursuant to Order 21 Rule 6 of the High Court Rules it was necessary for the appellant to obtain the leave of the Court to withdraw the summons. There is no doubt in my judgment that the following subsequent comment by the learned Judge indicated that leave to withdraw was granted:

"Judge: So then, I have filled out the application for withdrawal and no added cost so inter partes summons is accordingly struck off and the matter will take normal course."

- [7] It was after the order to that effect was made on 3 August 2017 that the appellant filed a notice of appeal on 23 August 2017 seeking to challenge the order made by the High Court at the request of the appellant.

- [8] In my opinion the respondent has been brought to the Court of Appeal unnecessarily and therefore should be awarded reasonable costs in respect of the work involved as a result of the appellant's misconceived appeal.

- [9] Before fixing the amount, I should say that in any case when an appellant seeks to withdraw an appeal then, unless there is no application by the respondent, an appellant can expect to have an order for costs made in favour of the respondent.

[10] In this case I award the sum of \$2000.00 to the respondent and grant the appellant's application to withdraw the appeal which is thereby granted and dismissed pursuant to section 20(1)(h) and (j) of the Act.

Orders:

1. *Appeal dismissed*
2. *Appellant to pay costs to the Respondent in the sum of \$2,000.00 within 28 days from the date of this Ruling.*



W. Calanchini

Hon Mr Justice Calanchini
PRESIDENT, COURT OF APPEAL

Solicitors: Naco Chambers for the Appellant
R. Patel Lawyers for the Respondent