

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

**CIVIL ACTION NO. ABU 0041 OF 2015**  
**[On Appeal from the High Court Civil Action**  
**No. 0002 of 2010]**

**BETWEEN** : 1. **DIRECTOR OF LANDS**  
2. **REGISTRAR OF TITLES**

**Appellants**

**AND** : 1. **DOMINION FINANCE LIMITED**  
2. **PROLINE BOATING COMPANY LIMITED**  
3. **PROLINE MARKETING LIMITED (In Receivership)**

**Respondents**

**Coram** : **Jameel, JA**

**Counsel** : **Ms. S. Chand and Ms. S. Ali for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants**  
**Ms. N. Choo for the 1<sup>st</sup> Respondent**  
**Mr. M. Vama for the 2<sup>nd</sup> Respondent**  
**No appearance for the 3<sup>rd</sup> Respondent**

**Date of Hearing** : **23<sup>rd</sup> September 2019**

**Date of Judgment** : **3<sup>rd</sup> October 2019**

**RULING**

[1] This is an application by the 2<sup>nd</sup> Respondent for an order that, amongst others, the appeal be struck out and dismissed on the basis that the Appellants have failed to take steps to prosecute their appeal.

- [2] The application was made by summons filed on 31 October 2018, and was supported by an affidavit sworn on 26 November 2018 by Ratu Peni Delainavukailagi Faonelua Baro. The application was opposed by the Appellants. An answering affidavit was filed by Ajay Singh sworn on 24 December 2018 and Nitesh Lal dated 24 January 2019. Both parties filed written submissions prior to the hearing.
- [3] The Court’s jurisdiction to strike out and dismiss an appeal for failure to prosecute an appeal may be exercised by a justice of appeal pursuant to section 20(1) (g) of the Act which provides that:
- “20(1)A judge of the Court may exercise the following powers of the Court:*
- (g)to dismiss an appeal for want of prosecution or for other causes specified in the rules;*
- [4] The First Respondent filed an application for Judicial Review bearing No. HBJ 02 of 2010. The High Court delivered judgment on 31 May 2015 in favour of the 1<sup>st</sup> Respondent, and issued a writ of Certiorari quashing the decision of the 2<sup>nd</sup> Respondent dated 8 February 2010 to repossess the subject lands, and issued Declarations that the 2<sup>nd</sup> Respondent Director of Lands had acted unfairly in entering the 1<sup>st</sup> Respondent’s Crown Lease, and therefore the subsequent Mortgages are unlawful, null and void, and that the registration of any Crown Leases pursuant to the new Crown leases are wrongful, null and void.
- [5] Being dissatisfied with the Judgment of the High Court dated 31 May 2015, the Appellants filed notice of appeal on 16 June 2015. The Appellant’s notice of appeal seeks an order from the Court of Appeal that the judgment of the High Court be wholly set aside and sets out 19 grounds of appeal upon which the Appellants relies in support of the appeal.
- [6] The notice of appeal was served on the Respondents on 18 June 2015. It is that notice of appeal that is the subject of the present application.

- [7] On 13 January 2016 the 1<sup>st</sup> Respondent filed Notice of Motion notifying the change of its Solicitors from Sherani & Co, Barristers & Solicitors to Tonganivalu & Valentiabua, Barristers & Solicitors.
- [8] On 25 July 2017 the 1<sup>st</sup> Respondent filed Notice of Motion, informing the change of Solicitors from Tonganivalu & Valentiabua, Barristers & Solicitors, to Esesimarm & Co, Barristers & Solicitors.
- [9] From the judgment of the High Court, there emerged three categories of Appellants;
- (i) The State entities tasked with the administration of Crown lands and registration of title (the Director of Lands and the Registrar of Titles), and the original mortgagee of the lease,
  - (ii) The subsequent lessees (Blue Ocean Limited, the Appellants in ABU 56/2016), and Linda & Company Ltd. the Appellants in ABU 61/2016), and
  - (iii) The subsequent mortgagees (Australia New Zealand Banking Corporation, the Appellants in ABU 82 /2016 and Westpac Banking Corporation, the Appellants in ABU43/2015) of the second set of lessees.
- [10] The essence of the Appellants' Appeal is that the learned Judge erred in fact and in law, he arrived at findings against the evidence, and failed to appreciate the provisions of the Land Transfer Act (Cap 131), and the principle of indefeasibility of title. The Appellants also specifically urges that the learned Judge failed to consider the fact that two out of the three leases had been sold, and there was a consent order between the Appellants and the 1<sup>st</sup> Respondent that the third lease would be sold and the sales proceeds held in trust. The Appellants contend that the learned Judge erred in law and in fact in failing to hold that the only remedy available to the 1<sup>st</sup> Respondent was damages.
- [11] On 1<sup>st</sup> September 2016 this court directed that the six appeals, which arose from the Judgment of the High Court in HBJ 02 of 2010, be listed, called and heard together, and

directed the Attorney General's office to complete the preparation of the court records for and on behalf of the Appellants in all 6 appeals. These appeals are:

- (1) Civil Appeal ABU 037 of 2015 – Dominion Finance vs Proline Boating Company Limited & Ors.
- (2) Civil Appeal ABU 041 of 2015 – Director of Lands & Registrar of Titles vs Proline Boating & Ors.
- (3) Civil Appeal ABU 043 of 2015 - Westpac Banking Corporation vs Proline Boating & Ors.
- (4) Civil Appeal ABU 056 of 2016 - Blue Ocean Marine Limited vs Proline Boating Company Limited & Ors.
- (5) Civil Appeal ABU 061 of 2016 – Linda & Co. Limited vs Proline Boating Company Limited & Ors.
- (6) Civil Appeal ABU 082 of 2016 – ANZ Banking vs Proline Boating Company Limited & Ors.

### ***The Application for Dismissal of the Appeal***

[12] By Summons dated 31 October 2018, with supporting affidavit of Ratu Peni Delainavukailagi Faonelua Baro dated 1 February 2019, the 1<sup>st</sup> Respondent moved court for an order of dismissal of the appeal under sections 20(1) (g) of the Court of Appeal Act (“**the Act**”), and rules 7 (a), 17, 18, 18A read with Order 59 of the High Court Rules 1988. (“**the Rules**”).

[13] The affidavits of Ajay Singh and Nitesh Lal dated 24 January 2019 filed in opposition set out the steps taken that as directed by court, all the parties except the first Respondent, took steps in regard to preparation of the appeal record. The counsel had met regularly and exchanged correspondence, and this was evidenced by the emails that had passed between the Counsel for the Appellants in the six appeals, between December 2018 and January 2019. The Affidavit of Ajay Singh sets out in detail all the steps taken in order to

comply with the court order to ensure preparation of the Appeal record. I observe that after this court directed the Attorney General's office to take over the preparation of the court records for the purpose of the appeal, necessary steps had been taken as directed.

***Preparation of the appeal record.***

[14] The issues that need to be considered in regard to this application are whether there has been delay in the preparation of the record which amounts to want of prosecution of the appeal, warranting a dismissal of the appeal. I have already referred to section 20 (1) (g) of the Court of Appeal Act (Cap 12).

***The Rules***

Rule 18 (1) (a) of the Court of Appeal Rules provides that;

*“ The primary responsibility for the preparation of the record on appeal rests with the Appellants, subject to the directions given by the Registrar.*

Rule 18(2) provides that the record consists of the following documents;

*(f) the official transcript of the Judge's notes or record, if any, of such of the evidence given in the court below as is relevant to any question at issue on the appeal;*

***The Practice Directions***

[15] Registrar's Practice Direction No. 1 of 1999 provides as follows:

***“4. Legal Submissions and Lists of Authorities***

*Judge's Notes of Counsel's submissions will not form part of the record but written submissions and lists of authorities especially if referred to in the judgment or decision may be included.*

- [16] The 2<sup>nd</sup> Respondent alleges that the Appellants has failed to lodge the court records with the Registry and must therefore the appeal must be struck out. It submits that; the legal burden of preparing the records lies on the Appellants, in accordance with the procedure prescribed under Rule 18 and the time frames prescribed for the lodgment of the appeal, and that the appeal will be deemed to be abandoned and stand dismissed under Rule 17. The 2<sup>nd</sup> Respondent also submits that it is justified to invoke Rule 7 to aid in the interpretation of Rule 18 read with Order 59, and Rule 9(1). However, I find that this is baseless because the Appellants has complied with Rule 17(1).
- [17] The 1<sup>st</sup> Respondent has failed to show what prejudice if any has been suffered by it due to the delay in the appeal being heard, but states in its written submissions that the grounds of appeal are frivolous and must be struck out under the inherent powers of court. However, its application was filed under section 20 (1) (g) of the Act. I find that the written submissions of the 1<sup>st</sup> Respondent do not refer to the fact that this court directed the Attorney General's office to prepare the appeal record. However, this fact has been significantly left out of the application for dismissal as well as the submissions of the first Respondent.
- [18] In determining the standard to be applied in determining what constitutes conduct amounting to failure to prosecute an appeal or action, a leading authority is **Allen v Sir Alfred McAlpine[1968] 2 Q.B 229 at 224**.The principle laid down was that in order to constitute failure to prosecute an action, there should have been contumelious conduct or intentional default, or inexcusable delay for which the plaintiff or lawyers have been responsible so that it gives rise to a substantial risk of a fair trial not being possible. As to what amounts to inordinate delay is a question of fact and degree, and is case -specific. In my view the conduct of the Appellants must exhibit delay which is also irregular, immoderate or excessive. Delay by itself will not by itself result in the court dismissing an appeal if the Appellants is able to point to a valid and reasonable explanation. Further, if the delay does not cause the Respondent prejudice, dismissal will not be ordered unless the delay in prosecuting the appeal will necessarily result in irreversible prejudice to the Respondent, or the applicant for dismissal.

[19] Whilst Rule 18 (1) (a) imposes the primary responsibility for the preparation of the record on the Appellants, this is subject to directions given by the Registrar and of course, the Court. In this case because of the directions of this court, the obligation of the Appellants to prepare the record was taken away from it. Thus, the delay that has ensued is not attributable to the Appellants, and section 18(1) (g) will not apply. The record reveals that the Appellants has indeed taken all necessary and possible steps from the date of the lodgment of the appeal, and has complied with the directions of the Registrar which had been given from time to time. In view of this, taken in conjunction with the direction of this court that the Attorney Generals' office prepares the appeal record, I am unable to conclude that the conduct of the Appellants warrants the use of my discretion under section 20 (1) (g) of the Act, read with Rule 18 (1).

[20] I note that the only reason for the delay in the preparation of the record was the delay in the release of the Judge's Notes by the Registry. This too, is not delay attributable to the Appellants, nor the Attorney General's office because it had taken steps continuously to obtain transcripts of the Judge's Notes. Although the Judge's notes will not be necessary for the preparation of the record in an appeal from a judgment in an application for Judicial Review, it appears that the Attorney General's office considered it to be necessary in this case. In fact the learned counsel for the second and third Respondent relied on Rule 18 (1) (e) to explain the reason for applying for the Judges Notes.

[21] However, since an application for Judicial Review is commenced and concluded, usually, on affidavit evidence, the court's observations and Judge's Notes would ordinarily be confined to the oral submissions of Counsel, which are not available to the parties. Any directions given by court, or undertakings given by parties, cannot be extracted or relied upon purely from the Judge's Notes, unless they are also borne out by the court Record. The Judge's Notes cannot substitute for the court record, although it may, in certain circumstances assist in ascertaining the contents of the court record.

[22] In the circumstances, although the obligation to prepare the appeal record rests primarily with the Appellants, since this court has dispensed with that by its direction of 1 October

2016, it would be necessary to determine whether the Attorney General's office had taken steps to comply with the directions of court. The record reveal that the Attorney General's office did comply with the direction of this Court. The delay was on the part of the Registry, which ought to have in the first instance intimated to the parties that the Judges' Notes are not a necessary component in the preparation of the appeal record in this instance. However, the conduct of the Appellants does not bring it within the provisions of section 20 (1) (g) of the Act. I do not find that there was contumelious or intentional default or inexcusable delay on the part of the Appellants or the Attorney General's office.

[23] During the Hearing of this application, learned Counsel for the Appellants submitted that due to inadvertence the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had sent the notice of listing and other related communications to the former lawyers of the 1<sup>st</sup> Respondent, instead of to Esesimarm & Co, the present lawyers. It is recalled that the solicitors were changed on three occasions, therefore it is understandable that the notices were misdirected. I find that the Appellants, and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had otherwise made all efforts to take the relevant steps as directed by court, to prosecute communicate with all the parties.

[24] The substantive issue raised by the Appellants are meritorious and warrant consideration by this Court. It relates to a Crown Lease administered by the Director of Lands. The leases had been executed, cancelled and re -executed. The rights of the Appellants as a Mortgagee and the rights of bona fide purchasers become relevant. I am of the view that the grounds of appeal are meritorious.

[25] In conclusion the Appellants is entitled to have its appeal heard. The prejudice that will be suffered by the Appellants if the appeal is dismissed is likely to outweigh the prejudice that maybe suffered by the 1<sup>st</sup> Respondent by the appeal being maintained. The Appellants is entitled to costs of the application which was fixed summarily in the sum of \$500.00 to be paid within four 28 days of the date of this Ruling.



**Orders:**

1. *The 2<sup>nd</sup> Respondent's Summons and application dated 31 October 2018 are dismissed.*
2. *The Appellants notice of appeal filed on 16 June 2015 may be proceeded with.*
3. *The Appellant's are to complete the preparation of the appeal briefs within 6 weeks from the date of this Ruling.*
4. *The 1<sup>st</sup> Respondent is to pay costs of \$500.00 to the Appellants within 21 days from the date of this Ruling.*



A handwritten signature in black ink, appearing to read "F. Jameel", written over a horizontal line.

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**Hon. Justice F. Jameel**  
**Justice of Appeal**