

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

CIVIL APPEAL NO. ABU 134 OF 2018
(High Court of Lautoka Judicial Review No. HBJ No. 1 of 2017)

BETWEEN : **iTAUKEI LAND TRUST BOARD** ***Appellant (Respondent)***

AND : **MOHAMMED ASHIK ALI** ***Respondent (Applicant)***

Coram : **Basnayake JA**

Counsel : **Ms. L. Komaitai for the Appellant**
Mr. N. Nawaikula with Ms. S. Ratu for the Respondent

Date of Hearing : **14 November 2019**

Date of Ruling : **29 November 2019**

RULING

[1] The appellant/respondent (appellant) moved on 22 November 2018 by way of summons for leave to appeal out of time. This application is made pursuant to section 20 (1) (a) and (b) of the Court of Appeal Act. The appellant is seeking to appeal against the decision of the learned High Court Judge dated 16 July 2018.

[2] Originally the appellant iTaukei Land Trust Board (iTTLTB) had issued a lease to one Narend Kumar and Jasma Wati in respect of a land. The respondent/applicant (respondent) states that prior to this the respondent made an application to iTTLTB for the lease. However the lease was issued by the iTTLTB to Narend Kumar and Jasma Wati. The respondent sought a writ to declare that the lease issued to Narend Kumar and Jasma Wati was done by an error and also a directive to the iTTLTB to issue the lease to the respondent. That was done in a judicial review application where the learned High Court Judge issued a writ against the Board. The appellant (iTTLTB) failed to file an appeal on time against this decision. The appellant has now filed this enlargement of time application seeking permission to file a late appeal. If the Court of Appeal allows the enlargement of time application the appellant will be able to file a proper appeal against the respondent. The appellant is relying on an affidavit of Mr. Semi Senikuracivi dated 22 November 2018 in support of the appeal for the enlargement of time.

[3] In the affidavit Mr. Semi Senikuracivi states that he was the Legal Assistant to the Appellant Board. The proposed grounds of Appeal too have been annexed to the affidavit. The affidavit relates the following facts;

- a. *This appeal should have been filed by 27 August 2018. However this appeal was filed on 16 November 2018, which is 81 days out of time.*
- b. *Originally Mr. Nemani Tamani represented the Board. He was a Senior Legal Officer who filed an affidavit in opposition dated 4 August 2017.*
- c. *At the hearing Legal Officer Mr. Tomasi Daunisali appeared for the appellant (respondent in the High Court). It was alleged that Mr. Tomasi Daunisali, without defending the interests of the appellant, had consented to the respondent's claim (applicant in the High Court).*
- d. *At the time of delivery of the judgment it was Mr. Josefata Cati who worked as Legal Officer and was unable to file the appeal within 42 days due to the fact that he was newly appointed and was familiarising himself with the workload in Nadi legal cases and as a result failed to file the Notice of Appeal within 42 days.*
- e. *It was further stated that Mr. Tomasi Daunisali had consented to the respondent's claim against the interests of the appellant.*

- f. The affidavit filed in opposition in the High Court for Judicial Review No. HBJ 01 of 2017 was produced marked SS 5. In that the appellant had sought a dismissal of the respondent's application.*
- g. The affidavit in opposition gives all the necessary facts in opposing the respondent's application.*

- [4] At the hearing of this leave to appeal out of time application Ms. Komatai appearing for the appellant submitted that the Legal Officer who consented against the wishes of the appellant had left the employment soon after this case. The learned counsel submitted that the fact of consenting aroused a suspicion with regard to the conduct of the counsel. The appellant was not able to take any action against the counsel as the counsel had left the employment.
- [5] The learned counsel submitted that the issue before the High Court was with regard to an Agreement for Lease No. 6/77/40841 dated 1 January 2016 in the name of Narend Kumar and Jasma Wati. The application before the High Court was for a writ to direct the Board to hold that the above lease was issued to Narend Kumar and Jasma Wati in error and to have the lease issued to the respondent.
- [6] The learned counsel submitted that the appellant had opposed this application by way of an affidavit in opposition. However the Legal officer who represented the appellant had consented before the High Court to an order against the appellant contrary to section 12 of the iTaukei Land Trust Act. The learned counsel submitted that the appellant has a winnable case. The learned counsel submitted that under no circumstance can a party alienate rights without first obtaining the consent of the iTaukei Land Trust Board as per section 12 of the Act. In issuing the lease to Narend Kumar and Jasma Wati the Board has not made a mistake. She posed the question as to what was the mistake that the Board made in issuing the lease. It is only the counsel who appeared for the appellant at that time that could give an explanation. Unfortunately the appellant is not in a position to obtain this explanation. Another matter that was raised was for not making Narend Kumar and Jasma Wati a party before the High Court in the Judicial Review application.

Cancelling the lease necessarily affects the party in favour of whom a lease had been issued.

[7] The learned counsel for the respondent made oral submissions in court. He has filed written submissions as well. The learned counsel submitted that the delay has to be counted from the date of delivery of the Judgment to the date the appeal papers were served on the respondent which he reckoned as 146 days. The learned counsel also submitted that the reasons for the delay given by the learned counsel for the appellant could not be considered as valid. He submitted that the reason was the failure of the counsel to inform the delivery of the judgment. However the learned counsel could not answer court with regard to the conduct of the counsel appearing for the appellant as to why the counsel had acted prejudicial to the interests of the appellant.

[8] The learned counsel submitted that the Judicial Review application was made in 2017. However no one sought an intervention. The learned counsel submitted that the chances of winning are remote for the reason that the learned Judge has considered the merits of the parties before an order was made. It was further submitted that the respondent will be prejudiced as the leave to appeal out of time application has been made after a long delay.

[9] The following factors have been considered by the Appellate Courts in deciding the issue of granting an extension of time, namely;

1. The length of the delay.
2. The reason for the delay.
3. Whether there is merit justifying the appellate court's consideration.
4. If time is enlarged will the respondent be unfairly prejudiced.

“These factors may not be exhaustive, but they are a convenient yardstick to assess the merit of an application for enlargement of time. Ultimately it is for the court to uphold its own rules, while always endeavouring to avoid or redress any grave injustice that might result from the strict application of the rules of court” (Gates CJ in **Kumar v State** [2012] FJSC (21 August 2012))

[10] The length of the delay

The order appealed against was made on 16 July 2018. The application for leave to appeal was filed on 22 November 2018. The number of days accounted for is about 125. Allowing 42 days to file the appeal, the appellant is out of time by about 83 days.

Reasons for the delay

The reasons for the delay had been already spelt out in the submissions of the learned counsel for the appellant. The reason being that the Legal Officer appearing in this case left the employment leaving the officer who succeeded the onerous task of reorganizing the office. There is no doubt that the appellant in this case is involved in administering vast land and litigation. Such a large establishment is bound to come across problems due to staff insubordination. In this case it is alleged that the Legal Officer has deserted the employer for reasons unknown. The respondent could not dispute the stance taken by the appellant.

Any merit justifying the appellate court's consideration

The submission of the learned counsel is that the consent of the appellant is a requirement for alienation of land. Section 12 of the iTaukei Land Trust Act states that:

“Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his or her lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sublease or other unlawful alienation or dealing effected without such consent shall be null and void, provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before 29 September 1948 to mortgage such lease (emphasis added).

[11] The learned counsel for the appellant said that while an affidavit filed in opposition clearly spelt out the position of the appellant the Legal Officer who represented the appellant has given consent to the respondent's application by blatantly violating the instructions given. The documents filed vouch for the accuracy of some of the submissions of the learned counsel for the appellant. In view of the mandatory requirement spelt out in section 12 a question to be asked is whether the High Court could have made an order in favour of the respondent. The respondent does not speak of obtaining the consent of the appellant. Without such consent how could the respondent obtain a lease from the appellant? If the Legal Officer did not consent to an order in favour of the respondent, the court could not have made the impugned order. The circumstances under which the Legal Officer assisted court will be a matter for a future inquiry.

[12] Prejudice that would be caused to the respondent?

The learned counsel for the respondent complained that the respondent took the leave application by surprise as it was made several months later. However I am of the view that a court may need to find the circumstances under which the Legal Officer of the appellant gave consent to entering the judgment in favour of the respondent; Whether the Legal Officer had a reason to go against the instructions of the appellant? Was there any collusion between the parties? If there was collusion what is the prejudice?

[13] I am conscious of the delay that has occurred in this case. The length of the delay appears to be long. However there are other factors that a court is required to consider. The reasons for the delay and whether there is any merit may have to be considered together. This whole case revolves around section 12 of the iTaukei Land Trust Act. Considering the following facts, namely;

1. The appellant filing an affidavit in opposition objecting to granting an order in favour of the respondent;

2. The Legal Officer consenting to a judgment in favour of the respondent in violation of section 12;
3. The Legal Officer leaving the employment;
4. The affected party not being brought before court; In this case the lease was issued in favour of Narend Kumar and Jasma Wati. However they were not made parties in the High Court in the judicial review application.

[14] I am of the view that the above facts taken cumulatively, compels me to hold the scale in favour of the appellant and to grant an enlargement of time. Therefore I make the following orders, namely:

Orders:

1. *Extension of time to file appeal out of time granted.*
2. *The appellant to file grounds of appeal within 28 days.*
3. *Costs in the appeal.*



A handwritten signature in blue ink, appearing to read "Basnayake", is written above the printed name of the judge.

HON. MR. JUSTICE BASNAYAKE
JUSTICE OF APPEAL
