

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0025 of 2021
[High Court Civil Action No. 40 of 2010]

BETWEEN : **PITA NASUKIREWA NAIDIRI**

Appellant

AND : 1. **PANAPASA TALENIMESI**
2. **DIRECTOR OF LANDS**

Respondents

Coram : **Dr. Almeida Guneratne, P**

Counsel : **Ms A Swamy for the Appellant**
Mr E. Maopa for the 1st Respondent
2nd Respondent not represented
(Written submissions filed)

Date of Hearing : **20th July, 2023**

Date of Decision : **18th August, 2023**

DECISION

[1] In this application the appellant in his re-filed summons dated 7th April, 2021 has sought leave to appeal (out of time) the judgment of the High Court dated 22nd October, 2019 and a stay of execution of the said judgment.

Re: the Leave to Appeal (out of time) application

- [2] The principles applicable in an application seeking leave to appeal out of time are well established in the jurisprudence of Fiji.
- [3] Thus, without the need to cite precedents I shall consider those principles in their application to the instant case.

On the Reasons adduced for the delay

- [4] I have held in several single judge rulings that lawyers lapses must visit their clients although contrary judicial views have been expressed on some occasions by single judge decisions of the Supreme Court. Even in the full Court of the Supreme Court in **Fiji Industries Ltd v National Union of Factory and Commercial Workers** [2017] FJSC 30; CBV0008.2016 (27 October 2017) the Supreme Court, while granting leave to appeal against my single judge decision in the Court of Appeal as raising a question of public interest, eventually dismissed the appeal thus leaving it as an open issue.
- [5] For my part I re-iterate the view expressed in the Court of Appeal (ABU0007 of 2016) otherwise the concept of recognized agent is reduced to nothing. Once a lawyer is retained by a party, that party must stand or fall by that decision unless an allegation of misconduct or unprofessional conduct can be established in appropriate proceedings or at leave gross professional negligence.
- [6] In the instant case, the appellant contends that after the High Court judgment when he consulted the lawyers they advised there was no basis to appeal. Thereafter, he contends that he went to the current lawyers who proceeded to file the present appeal. In the result there resulted to a delay of 18 months on the Appellant's own showing. He must take the consequences for his procrastination.

- [7] Thus, I do not accept the reasons given by the Appellant for the delay.
- [8] Consequently, it is my view that, once the reasons for the delay are found to be unacceptable that should put the lid on the matter, a view I have expressed in several of my decisions which I re-iterate here without crowding this decision by citing those precedents.
- [9] However, I felt obliged to give my mind to the criterion of “prospects of success” on the authority of the oft quoted decision of the Supreme Court in NLTB v Khan [2013] FJSC1.

Consideration of the criterion “Prospects of Success”

- [10] I shall consider the said criterion in the light of the High Court decision and reasons given for that decision against the proposed grounds of appeal urged.

The High Court decision and reasons given therefor

- [11] The High Court determined and ordered that:

- “1. *There shall be judgment in favour of the plaintiff.*
2. *The plaintiff shall have equitable right/interest on the property being Crown Lease No. 18766 being Lot 5 ND 5176 containing an area of 8 acres 1 rood 24p land known as Vutisa in the District of Nadi Province of Ba.*
3. *The first defendant shall pay general damages in the sum of \$60,000.00 to the plaintiff with 6% interest from the date of writ of summons till the date of this judgment.*
4. *Special damages refused.*
5. *Claim against the second defendant dismissed.*

6. *The first defendant shall pay summarily assessed costs of \$3,500.00 to the plaintiff."*

[12] The learned Judge arrived at the following findings in making his determination which I shall summarise as below:

- (a) The appellant (1st defendant) had in fact made representations to the plaintiff in respect of him being the lessee of "the property" and that he had consented to commence to a joint venture on prawn farming.
- (b) That misrepresentation was actionable in tort and was therefore liable to pay damages.
- (c) A cause of action on the basis of fraud against the appellant also succeeds on the grounds that the evidence adduced showed that the appellant had urged fraudulent means to make the 2nd Respondent (Director of Lands) to believe that he was cultivating the said property for 21 years and therefore was entitled to be issued with a lease for the same.

The Grounds of Appeal Urged

1. ***THAT*** the Trial Judge erred in law and in fact when the High Court found that the Appellant made a fraudulent misrepresentation to the Respondents that the Appellant was owner of a State Lease when the Respondent was aware that there was no valid lease and that the Appellant had applied for renewal of the same.
2. ***THAT*** the Trial Judge erred in law and in fact in granting and rewarding general damages for misrepresentation in the sum of \$61,000.00 when the same award was not substantiated by evidence and the sum was excessive under the circumstances of the case.
3. ***THAT*** the Learned Trial Judge erred in law and in fact in finding that the First Defendant was fraudulent.
4. ***THAT*** the Learned Trial Judge erred in law and in fact in allowing the relief of the Respondents when the dealing between the Appellant and the Defendant was not connected by the Second Defendant pursuant to Section 13 of the State Lands Act.

5. ***THAT*** the Learned Trial Judge erred in law and in fact in ordering that the Respondents have equitable relief in the property comprised in State Lease Number 18766 being Lot 5 ND5176 when there was consent to any dealing between the Appellant and the Respondent as required under Section 13 of the State Lands Act.”

Assessment of the findings of Court has against the grounds of appeal urged

- [13] To begin with, the learned Judge had arrived at his findings on the evidence adduced. They are strong findings of fact and an appellate Court should be slow to fault them unless there are serious misdirections and/or non-directions and/or errors which I could not find in those findings.
- [14] Even if one were to agree with the Appellant’s contention based on the provisions of Section 13 of the State Lands Act tied up with the concept of “*a dealing*” that, there was no fraudulent misrepresentation on the Appellant’s part, on the more liberal interpretation in Derry v Peek [1889] 5 TLR 625, (H/L) the representation made by the Appellant amounts to a statement made recklessly or carelessly as to the truth of the statement for which the appellant must face the consequences resulting therefrom.

Determination

- [15] For the aforesaid reasons, I could not see a basis to exercise discretion pursuant to Section 20(1)(b) of the Court of Appeal Act and I am not inclined to grant leave to appeal (out of time).

The matter of the stay order

- [16] Leave to appeal (out of time) being refused, and therefore there being no appeal on foot, consideration of granting or not a stay order does not arise.
- [17] In any event, it transpired at the proceedings before me that, the judgment of the High Court has already been executed.

Order:

- 1) Application seeking leave to appeal (out of time) the Judgment of the High Court is refused.
- 2) Consequently, the application for a stay of execution of the High Court judgment is dismissed.
- 3) The Appellant shall pay to the 1st Respondent as costs of this application the sum of \$3,000.00 and to the 2nd Respondent (who filed written submissions though not entering an appearance at the hearing) the sum of \$1,500.00.



Almeida Guneratne

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Patel & Sharma, Nadi for the Appellant

Babu Singh & Associates for the 1st Respondent