IN THE FIJI COURT OF APPEAL, FIJI

ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 056 of 2022

Suva High Court HBC: 256 of 2015

BETWEEN : **ASHOK KUMAR**

APPELLANT

AND : **ANUP KUMAR**

RESPONDENT

Coram : **The Hon. Justice Filimone Jitoko**

Counsel for the Appellant : **Mr. G. O'Driscoll [O'Driscoll & Co]**

Counsel for the Respondent : **Ms. S. Saheb [Parshotam Lawyers]**

Date of Hearing : **13 October, 2023**

Date of Ruling : **20 October, 2023**

RULING

[1] The appellant and the respondent are brothers. They are joint owners as tenants in common of State lease 1981, situate at Flagstaff, here in Suva. The brothers inherited the property as beneficiaries from their father's estate, through their mother who renounced her life interest in the property in favour of her sons, the two brothers. The lease has approximately 25 years more to run before it expires. The appellant lives on the property while the respondent resides in New South Wales, Australia.

[2] Over a period of time, the brothers relationship soured, exacerbated according to the respondent, by his brother's callous treatment of their mother. In June 2019, the respondent's solicitors on his behalf wrote to the appellant informing that the respondent *"is interested in either selling his interest in the property to you or selling the property in the open market and sharing the proceeds".* No response was received by the respondent from the appellant.

[3] On 22 November, 2019 the respondent filed an Originating Summons seeking inter alia, an order for the sale of the property pursuant to Section 119 of the Property Law Act, and attached to his affidavit in support, the consent of the Director of Lands to institute the proceedings. Copies of the Summons and the affidavit were served on the appellant on 22 November 2019. Solicitors for the appellant acknowledged service of the Summons and the affidavit on 2 December 2019. The appellant filed its affidavit in opposition on 19 March, 2020 and affidavit in response filed on 19 May, 2020. The respondent filed its submissions on 2 July, 2020 while counsel for the appellant finally filed its submission on 24 December, 2020.

[4] The hearing was before Amaratunga J on 7 December, 2020 and on 28 January, 2021, His Lordship found in favour of the respondent. The Court's conclusion and orders are set out at paragraph 20 of the judgment as follows:

*"**CONCLUSION***

> *A party having an interest have a statutory right to seek an order for sale in terms of Section 119(2) of Property Law Act 1971, without resorting to partition. The court has a broad discretion to grant order for sale of the Property for the benefit of the parties notwithstanding objections raised by Defendant. The court needs to consider circumstances of the case. In this case if sale is not ordered inconvenience to Plaintiff is greater. At the moment benefits derived from property are enjoyed by Defendant to the exclusion of Plaintiff. It is rare in such an instance common tenant would agree to a sale as it would decrease the benefits that he enjoys. A parson who is enjoying entire property, is not a person who enjoy benefits proportionate to his interest. This itself cannot be the reason to allow*

inequitable request. It is not for the benefit of both parties, to refuse the sale, Objections of the Defendant for sale is overruled and sale of the property is allowed under following conditions. Considering the circumstances of the case no costs awarded.

FINAL ORDERS

a. *Plaintiff's application seeking sale of Crown Lease 1981 (the Property) is allowed subject to consent of Director of Lands at the time of sale.*

b. *Solicitors of Both parties to agree to an independent valuer and cost of valuation to be deducted from sale or shared equally by parties. The value of such valuation is the minimum price, for sale.*

c. *The property to be advertised at least three consecutive weekends on two local newspapers and highest bidder to be selected by independent part agreeable to both solicitors.*

d. *Parties are at liberty to appoint an independent real estate agent for the sale of the property in order to obtain highest value for the Property.*

e. *If the Defendant does not co-operate with the transfer of the property Chief Registrar or his nominee is appointed to sign execution of any document needed for transfer of the property.*

f. *All cost of transfer of property including tax be shared by the parties equally.*

g. *After above deductions (i.e. cost of sale) proceeds of sale be shared equally between the parties to this action.*

h. *Liberty to parties to apply generally.*

i. *No cost is awarded."*

[5] On 15 September 2022, the appellant filed Summons for leave to appeal out of time as well as a stay of execution. When the matter came before his Lordship the President of the Court of Appeal on 21 October 2022, the appellant was granted further time to serve the respondent with the Summons.

[6] Affidavit in opposition was directed to be filed on 16 January, 2023, but subsequently filed on 4 April, 2023 and the appellant's affidavit in reply directed to be filed by 16 February, 2023, was finally filed on 10 May, 2023. Submission by the respondent was filed on 3 August, 2023 while the appellant's submissions was filed on 5 September, 2023.

The Application for Leave to Appeal Out of Time

[7] The judgment of the High Court was delivered on 28 January, 2021. The Appellant had 42 days to file his appeal from the date of judgment but he filed his Summons for leave to appeal out of time on 16 September, 2022, some 18 months later.

[8] The principles to be applied in determining an application for an extension of time for filing a notice of appeal is well settled as underlined in **Native Land Trust Board v Khan** [2013] FJSC 1 at page 3.

> *"(i) the reason for the failure to file within time;*
>
> *(ii) the length of the delay;*
>
> *(iii) whether there is a ground of merit justifying the appellate courts consideration;*
>
> *(iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
>
> *(v) if time is enlarged, will the respondent be substantially be prejudiced?"*

[9] There are a number of cases that have considered these principles in deciding whether to grant or refuse leave **(Bank of Hawaii v Reynolds** [1998] FJHC 82; **Rajendra Prasad Brothers Ltd v Fiji Insurance (Fiji) Ltd** [2002] FJHC 220; **Khan v Suva City Council** [2011] FJHC 272; **Nilesh Ram v Coral Surf Resort Ltd** CA ABU 095/2017; and **Ghim Li Fashion (Fiji) Ltd v Ba Town Council** [2014] FJCA 192).

Length and Reason for the Delay

[10] There is no doubt that the delay of almost 18 months from the date of judgment before the appellant's summons for leave to appeal out of time, is an inordinate delay by any measure or standard. There have been cases where the court has refused leave where there were of shorter periods of delays.

[11] The reason for the delay then becomes an important consideration for the court. In his affidavit in support, the appellant admits that he was aware of the time limitation on filing of his appeal, but, that he had spent considerable time in organizing his appeal, coming as it did at the end of the COVID epidemic, and especially the costs and legal fees involved. He had unsuccessfully sought the assistance of the Legal Aid Commission and as well as financial assistance from an uncle in Australia although, as the respondent correctly pointed out, there were no evidence, documentary or otherwise, to support these claims.

[12] However, as Guneratne JA (as he then was) in **Ghim Li Fashion (Fiji) Ltd** (supra) qualified:

> *"(i) That even where the length and the reasons for the delay are adequately explained to the satisfaction of the court if an appellant is unable to satisfy the court as to his or her chances of success in appeal if application for extension is to be granted, then the application must be rejected;*
>
> *(ii) That even if the appellant fails to satisfy the court as the length and reasons for the delay, nevertheless a court shall allow an extension of time if it is satisfied that, an appellant has a reasonable chance of success should an application were to be granted;*
>
> *(iii) Unless the reason for the delay is owing to a mistake or misconception as to the correct applicable legal position on the part of lawyers."*

[13] The Supreme Court per Keith J in **Fiji Industries Limited v National Union of Factory and Commercial Workers** CBV 0008 of 2016, ABU 007.2016 elaborated on Guneratne JA propositions as follows:

> *"24. Propositions (iii) is the one which is the most relevant to the present discussion, but I want to comment briefly on propositions (i) and (ii) as well. Their effect, subject to proposition (iii), is to make the merits of the appeal the paramount, indeed the decisive, consideration. In my view, that goes too far. There may be cases where the merits of the appeal may not be that good, but where the overall interests of justice mean that the litigant should not be denied the opportunity of having his appeal heard. By the same token, there may be cases where the merits of the appeal are strong, but the prejudice caused to the other party if the appeal was allowed to proceed would be so substantial that it would be an affront to justice for the delay to be excused*
>
> *25. The bottom line here is that each case should be considered on its facts, with none of the factors which the court is required to take into account trumping any of the others. Each factor is to be given such weight as the court thinks appropriate in the particular case. In the final analysis, the court is engaged on a balancing exercise, reconciling as best it can a number of competing interests. Those interests include the need to ensure that time limits are observed, the desirability of litigants having their appeals heard even if procedural requirements may not have been complied with, the undesirability of appeals being allowed to proceed which have little or no chance of success, and the prospect of litigants who were successful in the lower court having to face a challenge to the decision much later than they could reasonably have expected."*

[14] Keith J's pronouncements above, encapsulate succinctly what the guiding principles of the law should be in our courts' dealing with an application for leave to appeal out of time. I venture only to suggest for completeness, that these are to be read together with His Lordship's *"Two final observations"* at paragraphs 45 and 46 of the judgment thereof.

[15] In my view, the delay of 18 months in this case is inexcusable. The fact that the appellant spent a considerable time, or so he claims, seeking financial assistance to help lodge is appeal can only go to mitigation. He had through his solicitors, known that there was a time deadline on filing of his appeal. That he has, through his uncle's help, now only managed to file his appeal, albeit it 18 months out of time tends to show either that he was inattentive to the legal requirements of his case, or his failure was not deliberate but showed a very determined individual to come back to challenge the decision of the court against

him. In the end, the court can only conclude that delay was mainly due to the Appellant's lack of financial means to pay for the filing of his appeal on time. But even if there has been a delay, the court will still consider whether there is merit in the appeal of the appellant.

[16] In **Gunac (South Pacific)) Ltd v Formscaff (Fiji) Limited** the Court of Appeal stated, (as per Calanchini P):

> *"In a case such as the present where the explanation of the delay is on the one hand unsatisfactory and on the other non-existent, the Appellant is required to show at the very lease that he has a reasonable chance of success. In assessing the chances of success a single judge in an application such as the present will not consider in detail the merits of any particular ground. A single judge exercising the power of the Court of Appeal under section 20(1) of the Act does not decide the appeal. The task is to form an overview of the appeal on the basis of the limited material that is available in the absence of the appeal record and to assess the chances of success."*

The merits of the proposed appeal

[17] Counsel for the appellant argued that the exercise of the court's discretion under section 119 of the Property Law Act envisaged first and foremost, the contemplation by the court of the partitioning of the jointly owned property, before other options including sale is considered. He refers to the set-up and wording of the Act, firstly the leading of the division that reads:

> *"Part XIII Partition of Land and Division of Chattels"*

and the sub-heading of section 119 that reads:

> *"In action for partition court may direct land to be sold,"* and specifically, section 119 (1) leading on to sub-section (2) under which this proceedings began, categorically states:
>
> *"119 (1) Where in an action for partition the party or parties interested, individually or collectively, to the extent of one moiety or, upwards, in the land to which the action relates requests the court to direct a sale of the land and distribution of the proceeds, instead of a division of the land between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale accordingly."*(emphasis is mine)

[18] The appellant submitted that the court had failed to consider the partitioning of the property before it proceeded to direct the sale. This especially so, given that the appellant had submitted a subdivision proposal for the property, drafted by a registered surveyor agreed to by the both parties. The respondent did not favour the partition the partition and independently sought the sale of the property instead. For his part, the appellant favoured the partitioning. It is for the court upon weighing all the evidence, before exercising its discretion, to decide what is beneficial and in the best interest of all the parties.

[19] While I agree with the court's interpretation in **Thomas v The Estate of Eliza Miller & Tess Golding** [1946] 42 FLR 268, that a section 119 proceedings need not always begin by an action for partition, the relevant consideration is, should not the court always raise it as a viable, if not a first, option before sale.

[20] To the extent that the proper interpretation by the court of the provisions of section 119 and especially as it relates to partitioning before order for sale is made, I believe is an important legal issue, and lends some support to the merit of the appeal.

Will there be prejudice to the respondent?

[21] The respondent remains the joint owner and according to his affidavit in support of his originating summons he continues to receive the rents from Flat 2 of the property, since September 2018.

[22] If, in the event, that the final outcome of this proceedings results in the sale of the property, there is every chance given the state of the property market in the country, that the value of the property would have increased considerably, to the benefit of both parties.

Conclusion

[23] Given all the circumstances as outlined above, I will grant the appellant's Summons seeking leave to file his appeal to the Court of Appeal, out of time, on the condition that the appellant pay for the respondent's costs.

[24] **Orders**

1. *Enlargement of time to file leave to appeal is granted.*

2. *There be stay of the execution pending hearing of the appeal.*

3. *Appellant is to file and serve notice of appeal within 14 days from the date of this Ruling and thereafter to comply with Rules 17 and 18 of the Rules.*

4. *The Appellant is to pay costs to the Respondent on the sum of $2,000.00 within 14 days from the date of this Ruling.*

5. *In the event of non-compliance by the Appellant with either Order 2 or Order 3 above, the appeal is deemed to have been abandoned.*

COURT OF APPEAL FIJI

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The Hon. Justice Filimone Jitoko

PRESIDENT, COURT OF APPEAL