

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

CIVIL APPEAL NO. ABU0083 OF 2022
[Probate Action HPP 79 of 2021]

BETWEEN : 1. **ROPAL RAKSHA KUMAR**
2. **RAVINDRA NARAYAN**
3. **MOHAMMED ZAMIR KHAN**
Appellants

AND : 1. **SURYA NARAYAN PANDE**
2. **LIAN LIANSHIKA NARAYAN**
Respondents

Coram : **Dr. Almeida Guneratne P**

Counsel : **Mr A Khan for the Appellants**
Mr A Pal for the Respondents

Date of Hearing : **24th April, 2023**

Date of Decision : **12th June, 2023**

DECISION

[1] This is an application (dated 13th December, 2022) by the Appellants (Applicants) (via Summons), whereby they have moved for leave to file an appeal out of time the decision of the High Court dated 10th February, 2022 in Civil Probate Action No. HPP 79 of 2021 and for a stay of execution of the orders made in the said decision of the High Court until final determination by this Court. The said application was supported by the first

Applicant as the Administrator of “*the Estate*” (which was the subject matter of the “*Probate action*”) supported by affidavit. (filed of record).

[2] Having given directions to the Registry to list the matter for a returnable date on the Applicants said summons (as referred to above) and the matter having “*come-up*” before me on the 5th January, 2023, this Court made orders setting time lines for parties to file affidavits in opposition and replies thereto and the case to be mentioned on the 24th of April for further steps and orders.

[3] On the 24th April, when the case was mentioned, affidavits as referred to above having not been filed it being the Respondents’ obligation to have filed an affidavit in opposition to the Applicants summons in the first instance, the same having not been filed, on the assurance given to Court that the same would be filed on the very said date (namely, 24th April), this Court, in a stroke of judicial indulgence permitted it to be done, while directing parties to tender written submissions concurrently by the 30th May, 2023, and informing parties that, a Ruling (Decision) on the “*Application*” (of the Applicants) would be given on Notice to parties. (vide: proceeding as recorded on the 24th April, 2023).

[4] As at the 30th May, 2023, the Respondents had not filed affidavits opposing the Applicants application for leave to appeal (out of time) the High Court Orders of 10th February, 2022 and the stay of execution of the same. Moreover, neither party has filed written submissions as directed by Court on the said date of 24th April.

The Resulting Position

[5] Consequently (and in the result) I have before me only the Applicants summons (dated 13th December, 2022 and the supporting affidavit of the 1st Applicant of even date to make a determination on the Applicants’ Appellants’) application.

Discussion and Determination

Taking first the failure on the part of the Applicants to appeal the High Court Judgment (Orders) of 10th February, 2022 within the prescribed time by law.

[6] The delay in that regard, the Applicants (through the 1st Applicant's affidavit) has sought to explain. (in paragraphs 5 to 7 of the said affidavit).

[7] I am afraid that the reasons for the delay adduced by the Applicants could not convince me to excuse the same.

Criterion of Prospects of Success in Appeal

[8] However, on the time tested decision in **NLTB v Khan** (per Gates, J (2013) FJSC1), are there meritorious grounds for appeal and/or reasonable prospects of success in appeal if leave was to be granted?

The impugned Judgment of the High Court dated 10th February, 2022 and the nature of the Orders contained therein

[9] The said orders are contained at page 6 of the judgment (Ruling).

[10] There is no gain saying that, the said orders are of an interim nature.

[11] Quite apart from the relationship of the parties involved in the matter (being a probate action), in my assessment, the Applicants needed to, in the least, comply and complain against the said Orders (in which regard I took cognizance of what the learned High Court Judge had said at paragraph [10] of his Ruling.

[12] Another factor that struck me was whether, in any event, the Applicants ought to have sought leave to appeal against the said High Court judgment being clearly in the nature of an interlocutory ruling. The very notice and grounds of appeal dated 13th December,

2022, filed of record bear testimony to that. However, it is to be noted that, the Applicants have sought to appeal (by a direct appeal – out of time).

[13] Subject to what I have said above, I did look at the “purported grounds of appeal” urged by the Applicants as well viz: that;

- “1. *The Learned Judge erred in law and in fact in failing to take into consideration that there was no evidence before the court of existence of any specific fund that could be protected by the court orders despite the Respondents having made the relevant application under the Order 29 Rule 2 of the High Court Rules 1998;*
2. *The Learned Judge erred in law and in fact in failing to take into consideration that the orders sought by the Respondents did not have the effect of preserving the status quo, but in effect would disturb the same;*
3. *The Learned Judge further erred in law and in fact in failing to find that the balance of convenience did not lie in favour of granting the orders that the Respondents had sought from the Court.”*

[14] Those are the very issues the learned High Court Judge had addressed at paragraph [7] to [10] of his Judgment (Ruling) and I hold that, the said grounds urged by the Applicants have not met the reasoning of the Judge.

[15] Accordingly, I was unable to agree with the Applicants contentions that, there were “*reasonable prospects of success in appeal*” if leave to appeal was to be granted.

[16] On the basis of the reasons articulated above (for any one or more of them), I could not find myself to be persuaded to grant the orders sought by the Applicants (Appellants) in their summons dated 13th December, 2022 in consequence of which I proceed to make my Orders as follows.

Orders of Court

- 1) *The Applicants (Appellants) application seeking leave to appeal (out of time) the Judgment (ruling) of the High Court dated 10th February, 2022 is refused.*
- 2) *Consequently, the order sought by the Applicants (Appellants) to stay execution of the impugned order contained in its Judgment (Ruling) is also refused.*
- 3) *The Applicants (Appellants) are ordered to pay to the Respondents as costs of this application a sum of \$2,500.00.*



A handwritten signature in purple ink, which appears to read "Almeida Guneratne", is written over a horizontal line.

Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Reddy & Nandan Lawyers for the Appellants
AP Legal for the Respondents