

In the High Court of Fiji at Suva
Civil Jurisdiction
Civil Action No. 20 of 2012

Between:

Trustees of Nabua Matua Taxi
Plaintiff
And
Lomaco Baleilevuka
Defendant

COUNSEL: Mr P. Kumar for the plaintiff
Mr S. Valenitabua for the defendant

Date of hearing : 3rd March, 2016

Date of judgment: 27th September, 2016

Judgment

1. The defendant has filed notice of motion seeking leave to appeal and stay of my judgment declining his application to strike out the statement of claim, pending the determination of his appeal to the Court of Appeal.
2. In his affidavit in support of the motion, the defendant states:
 - i. The sole legal issue is the locus standi of the “*purported trustee*” who commenced these proceedings, when their terms as trustees had expired.
 - ii. He has shown a prima facie case for grant of leave to appeal. There is a good arguable legal issue of far-reaching importance.
 - iii. The defendant will be greatly prejudiced if the substantive matter proceeds to trial, as the plaintiff lacks locus standi. No prejudice will be caused to the plaintiffs, if leave to appeal and stay is granted.

3. The grounds of appeal contained in the attached draft notice of appeal read as follows:
 - 1) *The Learned Judge erred in law and in fact in failing to consider and determine the lack of issue of lack of locus standi of the Respondent at the date of filing the High Court Action against the Defendant on*
 - 2) *The Learned Judge erred in law in not striking out the High Court proceedings instituted against the Defendant, under Order 18 Rule 18 of the High Court Rules.*
4. The plaintiff, in its statement of claim moves inter alia for the removal of the defendant from administering the plaintiff Trust.
5. The plaintiff moved for striking out the statement of claim on the ground that it discloses no reasonable cause of action. At the hearing on the application to strike out, Mr Valenitabua, counsel for the defendant submitted that the parties stated in the statement of claim to be trustees of the plaintiff had no locus standi to bring this action. They were not trustees at the time writ was filed on 26th January, 2013.
6. I declined the application to strike out for the reason that a resolution of the Trustees of Nabua Matua Taxi passed at a meeting held on 18th December, 2013, filed in these proceedings provides that the seven persons referred to in the statement of claim were trustees of the plaintiff, at the time the writ was filed.
7. In my judgment, there are no prospects of success in the proposed grounds of appeal.
8. It is a “*well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, only in plain and obvious cases that are clear beyond doubt*”- Megarry VC in *Gleeson v. J. Wippell & Co*, [1977] 1 WLR 510 at 518.
9. The defendant seeks leave to appeal an interlocutory order.

10. It is an accepted principle and practice that “*interlocutory orders and decisions are seldom amenable to appeal...Leave is granted only in the most exceptional circumstances. It will not be granted if the court forms a clear opinion adverse to the success of the proposed appeal*”,(emphasis added) as Wati J stated in *Giesbrecht v Cross*, [2011] FJHC 443.

11. Young CJ and Jenkinson J in *Dunstan v Simmie & Co Pty Ltd.*(1978) VR 669 at page 670, declared:

Again, although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the preliminary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd (1969) V. R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand.
(emphasis added)

12. In *Hussein v National Bank of Fiji*, [1995] FJHC 188 it was held that there is a strong presumption against granting leave to appeal from interlocutory orders which do not finally determine any substantive right of either party. Pathik J cited the following passages from the oft quoted judgment of Murphy J in *Niemann v Electronic Industries Ltd*, (1978) VR 431 at pg 441:

If the order is seen to be clearly wrong, this is alone not sufficient. It must be shown, in addition to effect a substantial injustice by its operation....

- 1) *whether the issue raised is one of general importance or whether it simply depends upon the facts of the particular case;*
- 2) *whether there are involved in the case difficult questions of law, upon which different views have been expressed from time to time or as to which he has been "sorely troubled";*
- 3) *whether the order made has the effect of altering substantive rights of the parties or either of them; and*
- 4) *That as a general rule there is a strong presumption against granting leave to appeal from interlocutory orders or judgments which do not either directly or by heir practical effect finally determine any substantive rights of either party.*(emphasis added)

13. .. Calanchini J (as he then was) in *NBF Asset Management Bank V Taveuni Estates Ltd & Others*, (Civil Action No. HBC 543 of 2004) stated that:

It is trite law to say that only in exceptional circumstances will leave be granted to appeal an interlocutory order. Leave will not normally be granted unless some injustice would be caused. (emphasis added)

14. Sir Moti Tikaram, in *Totis Inc Spor (Fiji) Limited v John Leonard Clark* ,(Civil Appeal ABU0035 of 1996 S) said:

It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal.... Courts have repeatedly emphasized that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji Court of Appeal has consistently observed the above principles by granting leave only in the most exceptional circumstances.

15. In my view, there are no exceptional circumstances for the grant of leave to appeal my interlocutory order declining the application to strike out the statement of claim. There is no basis for the stay of proceedings.

16. *Orders*

- (a) The application for leave to appeal and stay of my proceedings is declined.
(b) The defendant shall pay the plaintiff costs summarily assessed in a sum of \$ 1000 within 15 days of this judgment.



A.L.B. Brito-Mutunayagam

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Judge

27th September 2016