

**IN THE HIGH COURT OF FIJI**  
**(WESTERN DIVISION) AT LAUTOKA**  
**CIVIL JURISDICTION**

**CIVIL APPEAL NO. HBC 172 OF 2015**

(On appeal from the High Court of Fiji  
at Lautoka in the matter Civil Action  
No. HBC 172 of 2015)

**BETWEEN** : **RADHABAI** aka **RADHA BAI** of Malolo, Nadi, Domestic Duties  
as the Sole Executrix and Trustee in the Estate of Abhimanyou  
Lingam aka Abhimanyu Lingam late of Vuniyasi, Nadi, Market  
Vendor, Deceased.

**PLAINTIFF/APPELLANT/RESPONDENT**

**AND** : **BALVEER SINGH** and **JAGINDRA SINGH** aka **JAGINDAR**  
**SINGH** Trustees in the Estate of Gurdiyal Singh aka Gurudayal  
Singh aka Gurdial Singh aka Hardayal Singh of Wailoku, Suva.

**DEFENDANTS/RESPONDENTS/APPLICANTS**

**Appearances** : Mr R.C. Singh for the defendants/respondents/applicants  
Mr R.P. Singh for the plaintiff/appellant/respondent

**Date of Hearing** : 18 September 2018

**Date of Ruling** : 23 October 2018

## **R U L I N G**

[On leave to appeal]

### **Introduction**

[01] Before me is an application for leave to appeal an interlocutory order of 20 August 2018, delivered by me reinstating an appeal which was deemed abandoned for procedural non-compliance (*the order*).

[02] The application is supported by the affidavit of Balveer Singh, the defendant/respondent/applicant (*the applicant*) filed on 4 September 2018. The plaintiff/appellant/respondent (*the respondent*) opposes the application. He filed his affidavit in response on 11 September 2018.

[03] The application for leave to appeal has been filed within 21 days as required.

[04] At the hearing, both the parties made oral submissions, and they also tendered their written submissions.

### **Background**

[05] The appellant issued a writ of summons endorsed with the statement of claim against the respondents alleging that the foreclosure by the respondent against the appellant was inconsistent and not exercised in compliance with sections 73, 74 and 75 of the Land Transfer Act.

[06] The respondent filed a striking out application. The Learned Master struck out the claim. The Master found the claim to be statute barred by virtue of s. 4(2), of the Limitation Act as the purported foreclosure was conducted sometime in 2000. The substantive action was instituted in 2015.

[07] The appellant sought leave to appeal the Master's order that struck out the claim. The Court granted leave to appeal the Master's order when the Court said the proposed grounds of appeal raise some arguable legal points and that there is a real prospect of success. When granting the leave, the Court ordered that the appellant shall file and serve the notice of appeal within 7 days of the ruling. The ruling was delivered on 21 May 2018. The appellant filed and served the notice of appeal within 7 days as ordered. However, the appellant did not file and serve a summons returnable before a Judge for directions and a date for the hearing of the appeal within 21 days of the filing of notice of appeal as required by O 59, R 17 (2) of the High Court Rules 1988, as amended (*HCR*). The appellant was late by 2 days in filing and serving such a summons. The respondent by way of preliminary objection argued that the appeal is deemed to be abandoned by operation of Rule 17(3). That rule deems the appeal abandoned if the procedure after filing the appeal is not complied with. The court by its ruling dated 20

August 2018 reinstated the appeal. The respondent seeks leave to appeal that order.

### **The Grounds of Appeal**

[08] The respondents intend to appeal the interlocutory order on the following grounds:

- (i) *The Learned Judge erred in law in re-instating the Respondent's Appeal filed on 21<sup>st</sup> May, 2018 which was deemed abandoned for non-compliance of the mandatory provision of the High Court Rules, where there was no such application for re-instatement before the Court.*
- (ii) *The Learned Judge erred in law in wrongly applying Order 2 Rule 1 of the High Court Rules to cure the Respondents' application for non-compliance with the rules especially when the appeal has already been abandoned and there was no appeal on foot.*
- (iii) *The Learned Judge erred in law when he wrongly applied Order 3 Rule 4 of the High Court Rules when there was no appeal on foot.*
- (iv) *The Learned Judge erred in law and wrongly exercised his discretion to re-instate an appeal by the Respondent which has been deemed abandoned by reasons of non-compliance with the rules of the High Court when there was no such application before the Court by the Respondent nor there was any valid appeal on foot.*

### **The Test for Granting Leave**

[09] The test for granting leave appeal an interlocutory order or judgment was discussed in *Bank of Hawaii v Reynolds* [1998] FJHC 226 where Pathik, J. referring *Ex parte Bucknell* [1936], held:

*'At the same time, it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for Leave to Appeal under s5 (1) (a) should not be granted as of course without consideration of the nature and its circumstances of the particular case. It would be unwise to attempt on exhaustive statement of the considerate which should be regarded as a justification for granting Leave to Appeal in the case of an interlocutory order, but*

*it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment'*

*The Court in Ex parte Bucknell went on to state at page 225:*

*But any statement of the matters which would justify granting leave to appeal must be subject to one important qualification which applies to all cases. It is this. The Court will examine each case and, unless the circumstances are exceptional it will not grant leave if it forms a clear opinion adverse to the success of the proposed appeal.'*

- [10] Lord Woolf MR said in *Swain v Hillman* [2001] 1 All ER 91 that a 'real' prospect of success means that the prospect of success must be realistic rather than fanciful.
- [11] Even hopeless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy (*Beedell v West Ferry Printers Ltd* [2001] EWCA Civ 400, [2001] 1 CR 962).

#### **The decision**

- [12] The respondent applies for leave to appeal an interlocutory order which reinstated an appeal which had been deemed abandoned for failing to comply with the procedure after filing an appeal pursuant to O 59, R 17 (3) of the HCR, that is, failing to file and serve a summons returnable before a Judge for directions and a date for the hearing of the appeal as required by R 17 (2).
- [13] Mr R.C. Singh of counsel for the respondent contends that the issue raised in the grounds of appeal are of exceptional importance to the practice and procedure and the High Court Rules on how appeals from the Master's decisions to the Judge are to be dealt with and whether the Court can exercise its discretion to extend the time when there is no proper appeal on foot. He further contends that the provisions of Order 59 of the HCR are mandatory and when there are mandatory provisions, the rules need to be followed.
- [14] Mr R.P. Singh, counsel for the appellant on the other hand argues that: the High Court is established under section 3 of the High Court Act ('HCA') and has an inherent jurisdiction apart from any jurisdiction granted to the High Court by the

statute. The High Court is not a creature of statute as the Magistrate's Court is. Essentially, Mr Singh submits:

- a) There is no real injustice done to the respondent if leave is refused.
- b) The grounds of appeal have no real likelihood of success taking into account that this Court has inherent jurisdiction to allow the appeal to proceed in the interest of justice.
- c) There are no exceptional circumstances for leave to be issued.
- d) The respondent still has time to appeal the decision to allow the appeal to proceed when the substantive appeal before the court is dealt with.

- [15] Following an Australia case, *Selling & Selling* [2017] Fam CAFC 30 (1 March 2017), this court reinstated the appeal which has been deemed abandoned by operation of R 17 (3) for failure to file and serve a summons for direction and a date for the hearing within 21 days. The appellant was 2 days late to do so.
- [16] The respondent submits that in *Selling* (above) the appellant failed to file summary of argument as required by Rule 22.22 of the Family Law Rules 2004 (Australia) and in breach of that Rule 22.21 which deems an appeal abandoned if the appellant fails to file the appeal books by due date. The submission continues that there the Rules gives right for a party to file extension of time to file the appeal books. Therefore, the appellant made a proper application before the Court wherein the Court exercised its discretion under the above provision and reinstated the appeal.
- [17] In my view, the proposed grounds of appeal raise an important issue whether the Court has the residual inherent jurisdiction in the absence of express provision in the HCR to reinstate an appeal which is deemed to have been abandoned for failure to comply with the procedure after filing the appeal and if so, whether such jurisdiction can be exercised even without an application by the appellant to reinstate such deemed abandoned appeal.
- [18] The points of law raised in the proposed grounds of appeal appear to be the subject of considerable controversy. Even helpless appeal may be allowed to proceed where the area of law in question is the subject of considerable controversy (see *Beedell's* case, above).

[19] I am satisfied that the issues raised in the proposed grounds of appeal are exceptional and need to be determined by the Full Court of Appeal.

[20] For these reasons, I would grant leave to appeal the interlocutory order dated 20 August 2018. Accordingly, the applicant shall file and serve a notice of appeal within 7 days of this ruling. The costs of this application shall be in the appeal.

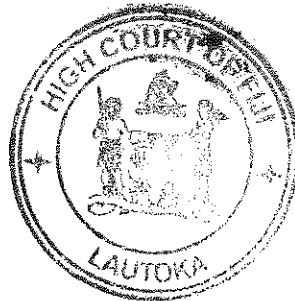
**The outcome**

1. Leave to appeal the interlocutory order dated 20 August 2018 is granted.
2. The applicant shall file and serve a notice of appeal within 7 days of this ruling.
3. Costs shall be in the appeal.

*M. H. Mohamed Ajmeer*  
..... 23/10/18

**M. H. Mohamed Ajmeer**

**JUDGE**



**At Lautoka**  
**23 October 2018**

Solicitors:

For the applicant: M/s Sherani & Co., Solicitors

For the respondent: M/s Patel & Sharma, Barristers & Solicitors