

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 369 of 2017

BETWEEN : LAGSEFURI KONGCHIU TAVO

FIRST PLAINTIFF

AND : MUA TAUKAVE

SECOND PLAINTIFF

AND : HENRY ENASIO

DEFENDANT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr V. Faktaufon for the First and Second Plaintiffs
Ms M. Rakai for the Defendant

Date of Hearing : 26 February 2019

Date of Decision : 28 February 2019

DECISION

1. This is the Defendant's Summons (Summons) for leave to Appeal and Enlargement of Time. He seeks the following orders:
 - [1] That the Defendant be granted leave to appeal the decision of the Master delivered on 4 October 2018.
 - [2] That time be enlarged for the Defendant to appeal the said decision.

2. The Summons is supported by the affidavit of Ms Alelia Daucakacaka (Alelia) sworn on 30 October 2018 who deposes as follows:
 - [1] She is the Law Clerk of the solicitors for the Defendant and "am duly authorized to make this Affidavit on their behalf."
 - [2] The Defendant filed a summons to strike out the claim on the basis that the Statement of Claim does not disclose a reasonable cause of action and is also an abuse of process as the orders sought in this action are similar to those sought in HBC No. 189 of 2007.
 - [3] The Defendant submitted that the declarations sought cannot be sought from him but from the Aota Clan who own the land communally, and are filed out of time as the Plaintiffs seek declaration beyond the statutory period allowed.
 - [4] The Master delivered a Ruling on 4 October 2018 refusing to strike out the claim.
 - [5] The Defendant was notified of the outcome on 4 October 2018 and told if he intended to appeal he needed to give instructions within 14 days.
 - [6] On 17 October 2018 another remainder was sent but until Friday 26 October 2018 no response was obtained.
 - [7] On Thursday 25 October 2018 they wrote to the Defendant informing that they were going to file an application to withdraw from acting for him for lack of instructions.
 - [8] On Sunday 28 October 2018 they received an email from the Defendant instructing them to file an application for leave to appeal and explained there had been "a flooding in Rockhampton

for a week and a half and because of this he could give us instructions.”

[9] The Defendant had 14 days from 4 October 2018 to appeal and “this application is being filed 15 days out of time because of a natural disaster beyond the control of the Defendant.”

[10] The basis for the appeal is because of the errors of law and fact in the decision of the Master.

[11] There would be a greater prejudice to the Defendant if leave to appeal is not granted given that the Master’s decision “was so manifestly wrong and unjust given that the Master did not analyze the principles of Striking out correctly.”

[12] That I (Alelia) seek orders in terms of the Summons.

3. The affidavit in response was sworn on 3 December 2018, by Joseph Kaurasi (Joseph) who deposes as follows;

[1] He is the litigation clerk of the Plaintiffs’ solicitors and duly authorized by the Plaintiffs to make this affidavit on their behalf.

[2] He is advised “by our Solicitors” that there are no errors of law and fact in the Master’s decision.

[3] There is no prejudice to the Defendant if leave is not granted as he has a second opportunity to raise the issues at the trial proper.

4. The Defendant in his affidavit in reply sworn on 13 December 2018, deposed as follows:

[1] He filed his leave to appeal 12 days out of time as a hurricane and flooding at his home town affected his internet and mobile until power was restored on 28 October 2018 when he emailed his lawyers.

[2] The Plaintiff are seeking declaratory orders on a dealing that took place in 1959 and 1960 more than 50 years later and only joining him as the only Defendant.

5. The hearing commenced with Ms Rakai submitting. She said they filed the application 12 days out of time. There are merits in the grounds of appeal.

6. Mr Faktaufon in his submission said he does not accept the date of flooding as no proof or evidence of the flooding was provided by the Defendant. The

Master said the issues should be heard in a full trial and not an interlocutory application.

7. Ms Rakai in her reply said that even if there were a full trial, the records are faded and the claim is only against the Defendant and not the entire clan.
8. At the conclusion of the arguments I said I would take time for consideration. Having done so, I shall now deliver my decision.
9. At the outset I shall refer to the Ruling of Sapuvida J delivered on 6 May 2016 in Panache Investment Ltd and/or its subsidiary company AND The New India Assurance Co Ltd: Lautoka High Court Civil Action No HBC 56 of 2014. His Lordship said at para [27] of his Ruling that:

“I plainly disregarded the affidavit of Sanil Kumar, a law clerk filed in support of the application for seeking leave to appeal the interlocutory ruling of the Master with reasons emphasizing the case law on the issue of filing affidavits by law clerks in contentious matters in the High court of Fiji.”
10. I adopt and apply the above Ruling to the instant case as I note the affidavit in support is affirmed by the solicitor’s clerk and not by the Defendant and contains facts in issues and issue of law which a Law Clerk cannot assert to, in the words of the Judge.
11. In the event the court has no alternative but to reject the affidavit of Alelia in toto. Consequently in the absence of an affidavit in support, the application for leave must necessarily fail.
12. But that is not all. There is no proof or evidence why the Defendant failed to give his instructions to his solicitors to appeal in a timely fashion. Even if the court were to believe for one moment that a natural storm could in this day and age totally prevent a party from communicating with his solicitor for any appreciable period of time, there is not an atom of evidence before this court explaining why the Defendant who had been notified of the Ruling on 4 October 2018 only instructed his solicitors on 28 October 2018 to appeal. In the court’s view, this evinces the Defendant’s lack of urgency or concern as to the Ruling. In these circumstances there can be no reason for the court to be indulgent in granting an extension of time.
13. Finally, no prejudice is suffered by the Defendant if this application for leave is refused. This is because the plain unvarnished truth is that, that will result in a full trial where both sides will be able to ventilate all issues and canvass all argument to assist their respective causes.

14. In the result, the Summons for leave to Appeal and Enlargement of Time filed on 30 October 2018 is hereby dismissed and the costs of this Summon shall be costs in the cause.

Delivered at Suva this 28th day of February 2019.



David Alfred
JUDGE
High Court of Fiji