

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. 155 of 2017

BETWEEN: **FIJI FOOTBALL ASSOCIATION** an association duly affiliated and registered with Federation Internationale de Football Association and having its registered office at Taramati Street, Bhindi Sub-division, Vatuwaqa, Suva, Fiji.

PLAINTIFF

AND: **NASINU LAND PURCHASE & HOUSING CO-OPERATIVE LIMITED (formerly Nasinu Land Purchase and Housing Co-Operative Society Ltd)** a society duly registered under the Co-operative Societies Ordinance and having its head office at 6½ Miles, Nasinu, Suva.

DEFENDANT

BEFORE: **Justice Vishwa Datt Sharma**

COUNSEL: **Mr. S.K. Ram** for the Appellant/Plaintiff
 Mr. Maharaj V for the Respondent/Defendant

DATE OF JUDGMENT: **24th January, 2025 @ 9.30am**

JUDGMENT

[Leave to Appeal and Stay of Proceedings and orders]

INTRODUCTION

1. The Appellant/Plaintiff filed a Summons coupled with an affidavit in support on 26 July 2023 and sought for **“Leave to Amend the Writ of Summons and the Statement of Claim filed on 30 May 2017 to join the Attorney General of Fiji as the Legal Representative of the Registrar of Titles as a Party to this proceedings if they do not offer compensation, to the Plaintiff on or before 31 August 2023.”**
2. This Court in its Judgment delivered on 25th April 2024 made the following orders:
 - (i) The Plaintiff’s application seeking for leave to amend the writ of summons coupled with the statement of claim of 30th of May 2017 is refused and dismissed.
 - (ii) The Plaintiff’s application seeking for leave to join the Attorney General of Fiji as the legal representative of the Registrar of Titles as a party to the current proceedings is refused and accordingly dismissed since the first limb application seeking for the amendment of the Plaintiff’s claim for specific performance in lieu of Damages in the like was also refused.
 - (iii) The Plaintiff, Fiji Football Association to pay the Defendant summarily assessed costs of \$2,000 within 14 days timeframe.
3. The Appellant/Plaintiff being dissatisfied with the Courts above Decision, subsequently filed an inter - Parte summons and is now seeking for the following orders in support of the Affidavit deposed by Mohammed Sheraaz:
 - 1) That Leave be granted to Appeal the Judgment of the Honourable Justice Vishwa Datt Sharma delivered on 25 April 2024.
 - 2) Directions be made by this Honourable Court for the conduct of the appeal and setting a hearing date for the appeal.
 - 3) The proceedings in the High Court and the orders of the High Court made on 25 April 2024 be stayed pending the determination of this Application and (if leave is granted) the appeal.
 - 4) The trial dates fixed in this matter by the High Court be vacated.
 - 5) The time for service and filing of this application and any appeal be abridged if needed.
 - 6) That the costs of this application be costs in the cause.

4. **The Proposed Grounds of Appeal:**

- (1) The Learned trial Judge error in law and fact by holding that Caveat No. 730831A did not represent the interest of the Appellant because it named the Caveator as Bob Sant Kumar particularly:-
 - 1.1 The issue of whether the caveat was correctly registered was a triable issue and not to be determined in an application for amendment and joinder.
 - 1.2 The High Court's premature determination of the matter has effectively denied the Appellant their right to present evidence and be heard on the validity of the Caveat. This also includes their right to seek damages against the First Respondent and compensation under the *Land Transfer Act 1971* against the Second Respondent.
 - 1.3 The Appellant is a legal entity that acts through its officers; therefore, an officer, in this case, the chief executive officer, had to present the Caveat.
 - 1.4 When correctly interpreted, the document's wording shows that Bob Sant Kumar presented the Caveat in his capacity as the Appellant's Chief Executive Officer.
 - 1.5 The interest being protected by the Caveat was clear from Lease Number 38753 (attached to the Caveat), which established the contractual relationship between the appellant and the First Respondent and not with Bob Sant Kumar in his personal capacity.
- (2) That the Learned Trial Judge erred in law and in fact by holding that the purported cause of action against the Registrar of Titles was statute barred when:-
 - 2.1 **Order 15 Rule 6(5) (a) of the High Court Rules** stipulated that a party can be added or substituted as long as the relevant period was current at the date when the proceedings were commenced, and it was necessary for the determination of the action that the new party should be added or substituted.
 - 2.2 The court did not properly address and/or consider that the Plaintiff's cause of action accrued when it discovered that the land was being dealt with in 2022, not in 2017.

- 2.3 The Plaintiff had duly complied with all statutory requirements to add the Attorney General as the representative of the Registrar of Titles to the Suva High Court Civil Action No. HBC 155 of 2017.
- (3) The Learned Trial Judge erred in law and in fact by not considering that the application to amend was not only limited to a claim for compensation against the Attorney General as the representative of the Registrar of Titles, but the amendments also sought to amend the Plaintiff's claim in relation to damages in lieu of specific performance against the Defendant.
- (4) The Learned Trial Judge erred in law and in fact at paragraph 47 when it determined that the cause of action will change when:-
- 4.1 Cause of action against the Defendant is and always was for breach of contract.
 - 4.2 The Plaintiff's remedy after refusal of injunction, now is limited to damages in lieu of specific performance.
 - 4.3 The amendment sought to plead and rely on facts that arose after the commencement of the proceedings, and which supported the Plaintiff's claim for damages against the Defendant.
 - 4.4 The cause of action against the Attorney General as legal representative of the Registrar of Titles was limited to compensation for its omission, mistake or misfeasance pursuant to Section 140 of the *Land Transfer Act 1971*.
- (5) The Appellant may add further grounds of appeal upon receipt of the Record.

Leave to Appeal

5. In *K R Latchan Brothers Limited v Transport Control Board and Tui Davuilevu Buses Limited* [1994] FJCA 24; ABU 12e of 1994s (27 May 1994); the full bench of the Court of Appeal (Tikaram, Quillam and Savage J. J.) upheld the Decision of Thompson JA who had held:

"The granting of Leave of Appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law. The learned judge has given full reasons for the order he has made. There is no suggestion of impropriety in

the appellant's affidavit. There is an allegation of misconception of the law, but if there was a misconception of the law, it is not a clear case of that. That matter can be made a ground of appeal in any appeal against the final judgment of the High Court, if the appellant is unsuccessful in the proceedings there."

6. The then President of the Fiji Court of Appeal, Sir Moti Tikaram in **Kelton Investments Limited and Tappoo Limited v Civil Aviation Authority of Fiji and Motibhai and Company Limited** [1995] FJCA 15; ABU 34d of 1995s (18 July 1995) held:

*"I am mindful that court have repeatedly emphasized that Appeals against Interlocutory orders and decision will only rarely succeed. As far as the lower Courts are concerned granting of **Leave to Appeal** against interlocutory orders would be seen to be encouraging appeals (Refer to **Hubball v Everitt and Sons (Limited)** [1990]. UKLawRpKQB 17; [1900] 16 TLR 168).*

*"Even where Leave is not required, the policy of Appellate Courts has been to uphold interlocutory decisions and orders of the trial Judge - refer to **Ashmore v Corp of Lloyd's** (1992) 2 All ER 486 where a Judge's decision to order trial of a preliminary issue was restored by the House of Lords."*

*"If a final order or Judgment is make or given and the Applicants are aggrieved, they would have a right of Appeal to the Court of Appeal against such order or judgment. Therefore, no injustice can result from refusing **Leave to Appeal**."*

"The Courts have thrown their weight against appeals from Interlocutory orders and/or decisions for very good reasons and hence Leave to Appeal are not readily given."

7. In **Kelton Investments Limited** (supra) - His lordship also relied upon a Decision of the Supreme Court of Victoria in **Niemann v. Electronic Industries Ltd** (1978) VicRp 44; (1978) VR 431; whereby Murphy J said (at page 441):

*"Likewise in **Perry v Smith** [1901] ArgusLawRp 51; (1901), 27 VLR 60 & **Darrel Lea Case** [1969] VicRp 50; [1969] V. R. 401, the Full Court held that leave should only be granted to appeal from an Interlocutory Judgment or Order, in cases where substantive injustice is done by the Judgment or Order itself. If the order was correct, then it follows that substantial injustice could not follow. **If the order is deemed to be clearly wrong, this is not alone sufficient. It must be shown**, in addition, to affect a substantial injustice by its operation."*

8. In **Tortis Incorporated, Sport (Fiji) Limited & Richard Evanson v. John Leonard Clark & John Lockwood Sellers** [unreported] Civil Appeal No. 35 of 1996S (12 September 1996), at page 6 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 principle by granting leave only in most exceptional circumstances."

Stay Pending Appeal

9. The principles to be applied on an application for '**stay pending appeal**' are summarized in the New Zealand text McGechan on procedure (2005):

"On a stay application, the Court's task is to "carefully weigh all the factors in the balance between the right of a successful litigant to have the fruits of a Judgement and the need to pressure the position in case the Appeal is successful;" Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (LA), at p 87,

"The grant or refusal of a 'stay' is discretionary matter for the Court [A.G v Emberson (1889), 24 QBD pp 58, 59]."

"Stay Pending Appeal will be granted where special circumstances of the case so require. There has to be sound reasons sufficient to justify the Court in suspending the rights of the successful party. In exercising its discretions the Court will look at the facts and circumstances which led to judgement. The balance of convenience has also to be looked at as well as the competing rights of the parties before it."

Determination

10. There are two (2) main issues before this Court to determine:

- (1) Leave to appeal; AND
- (2) Stay pending Appeal.

11. It must be borne in mind that to grant or refuse Leave to Appeal is a **discretionary matter in each case and may be reviewed if it is clear that it has been exercised on a wrong principle or a conclusion has been reached which would work a manifest injustice."** *G.L.Barker Ltd v Medway Building Supplied Limited (1958) 1 WLR. 1216* refers.

12. Further, the **grant or refusal of 'stay'** is discretionary and will be granted only where the special circumstances of the case so requires. There has to be sound reasons sufficient to justify the Court in suspending the rights of the successful party to the fruits of the litigation.

13. I have perused and taken into consideration the length and comprehensive written submission coupled with various case authorities shown to be relevant in the current proceedings to determine the two (2) impending issues of:

- (i) Leave to appeal; AND
- (ii) Stay pending appeal.

The initial proceedings (HBC 155 of 2017).

14. Above proceedings was filed in the High Court on 30 May 2017 by **Fiji Football Association** against the **Nasinu Land Purchase & Housing Corporation Limited**: The substantive proceedings is pending hearing and determination and some 08 years has lapsed to the current time. So far, the Court has only been dealing with interlocutory applications filed by the parties to the proceedings and yet another interlocutory application has been filed asking this court to determine:

- (i) Leave to appeal; AND
- (ii) Stay pending Appeal.

The impending interlocutory applications thus leaves the substantive matter to continue pending accordingly. Section 15 (3) of the 2013 Constitution is relevant which states "**that to a civil dispute has the right to have the case determined within a reasonable time.**" This Court has borne in mind the effect of section 15 (3) on the litigants as parties in the current proceedings.

15. It will be noted that **Attorney General of Fiji** as a Legal Representative of the **Registrar of Titles** and is not a party to this proceedings.

16. The Plaintiff made an application issued on 26 June 2023 for **Leave to Amend the Writ of Summons and the Statement of Claim, filed on 30 May 2017, and to join the Attorney General of Fiji as the Legal Representative of the Registrar of Titles.**

17. This application for **Amendment and Joinder** was made I support of an affidavit deposed by Bob Kumar. The Defendant and the Attorney General filed their Respective affidavits in opposition.

18. The **Amendment and Joinder orders** were sought by the Plaintiff because "**the sale of the subject land, the cause of action against the Defendant would change because there would be additional grounds to claim damages and that the Plaintiff also had a right to seek compensation against the Registrar of Titles.**"

19. According to the Plaintiff, the orders sought for **amendment and joinder** were necessary because of **events that arose after the proceedings were commenced in 2017.**

20. However, the initial substantive matter within HBC 155 of 2017 was claiming for '**specific performance**' of the **Sale and Purchase Agreement** between the Plaintiff and the Defendant dated 05 April 2002 and varied on 23 January 2006 and '**Damages**' for **breach of Agreement in lieu of or in addition to specific performance**.
21. The Plaintiff is aware that the **substantive action was alleging and claiming for Breach of Purchase Agreement and sought for the relief of 'specific performance' and 'special damages' and damages against the Defendant**. This substantive issue is still impending before the Court for Hearing and determination when the Plaintiff thought fit to file an application and seek for **amendment of the substantive claim** together with **Joinder** at this very late stage.
22. **Amendment to the Writ of Summons and the Statement of Claim** are provided for in terms of **Order 20 Rule 5 of the High Court Rules 1988** and is a **Discretionary** matter for the Court's to apply. The Courts have through the years by way of Decisions relating to amendments laid down principles regarding the application of the law relating amendments to the pleadings. This was dealt with an application in my decision delivered on 25 April 2024.
23. On the other hand, the Plaintiff's seeking for joinder and/or to add Attorney General of Fiji as the Legal Representative of the Registrar of Titles is made pursuant to **Order 15 Rule 6(2) to 5 of the High Court Rules 1988** and is also a discretionary matter for this Court to consider at this very late stage.
24. This was also sufficiently dealt with in my decision delivered on 25 April 2024.
25. Further, **Order 15 Rule 6 (5) (a)** provides - "that a party may be added/substituted to an action, should be read together with section 4(1) (a) of the Limitation Act 1971 which prohibits the filing of any claim pertaining to tort after the expiration of 6 years from when the cause of action first arose."
26. If the Caveat was allegedly lodged on 15 April 2010, then any cause of action against Registrar of Titles would have arisen from the date of the First transfer/dealing of land effected after the Registration of the consent i.e. 14 February 2017.
27. If above was the case then, the Appellant's purported cause of action against Registrar of Titles, if any, would have arisen in February 2017 and hence would be statute - barred by February 2023. The substantive action was filed and commenced in 2017 only against Nasinu Land Purchase & Housing Cooperative Ltd and not against Registrar of Titles then. It was only an afterthought. If the Appellant/Plaintiff that now discovered that then cause of action for '**specific performance**' against Nasinu Land Purchase & Housing Cooperative Ltd would fail that it then decided to file for the '**Amendment**' and '**joinder**' of **Registrar of Titles** in order to **claim for Damages**.

28. The Substantive action filed against Nasinu Land Purchase & Housing Cooperative Ltd is very much in existence and impending and therefore the Appellant/Plaintiff can proceed with their original cause of action for breach of contract (if any) and relief for damages which this Court would then hear and determine accordingly.
29. The subject land in question has changed zoning and 22 bona-fide purchases for value have been transferred separate residential titles.
30. These registered proprietors are not a party to the current proceedings. This court was informed that these dealings with the subject land was carried out by the defendant on the basis that there was no restraintment and/or caveat registered on the subject title since 2002.
31. According to the Registrar of Titles the Caveat by the Plaintiff in this action was lodged with the Registrar of Titles. However, it was never registered on the subject title since "the Caveat was not in its proper form, and even if it was considered to be registered, the Caveat was in relation to the interests of the Caveator and is only to part of lease no. 38753 - 20 acres only - without explicitly stating which portion of the area of the lease or providing relevant documentation as to which area of the said lease the caveat protected." "The purported Caveat also does not explicitly protect the interest of the Plaintiff, Fiji Football Association under the lease as the Plaintiff is not the Applicant of the Caveat, to be more specific, the Plaintiff, Fiji Football Association is not the Caveator.

If the Plaintiff has the Locus Standi to sue and/or be sued in its own name/capacity and not of its officers, then it could have filed the Caveat under its own name Fiji Football Association to safeguard its interests in the land in disputes in the current proceedings. However, the Appellant/Plaintiff failed to do so.

The Caveat only protected the interests of Bob Sant Kumar, irrespective of his position in the Appellate organization Fiji Football Association, with respect to the lease, not itself. The current substantive matter as it stands without amendment and joinder will proceed to Hearing and determination of the relief sought by the Plaintiff.

32. There are altogether four (4) Grounds of Appeal:

Ground 1: Challenges the Decision that the Caveat was not lodged to protect the Plaintiff's interest.

In answer to above, I reiterate that the Caveat was not registered because it was not in its proper form and which questions the area of the said lease the Caveat protected. Further,

the Plaintiff, Fiji Football Association is not the applicant of the Caveat, rather one Bob Sant Kumar is the Applicant.

Ground 2: Challenges that the Cause of Action against the Registrar of Titles was Statute-Barred.

I reiterate that Order 15 Rule 6 (5) (a) of the High Court Rules 1988 needs to be read together with Section 4 (1) (a) of the Limitation Act 1971 which prohibits the filing of any claim after expiration of 6 years.

Ground 3: The Court did not consider that the application for Amendment was not solely related only to joinder of Registrar of Titles but claim against existing Defendant to be considered, particularly damages. The amendment was sought as an afterthought when the Applicant/Plaintiff realized that the relief for '**Specific Performance**' would fail against the Nasinu Land Purchase & Housing Cooperative Ltd. However, relief for damages still exists and the Appellant/Plaintiff can proceed with damages claim hereof.

Ground 4: The Change in the Cause of Action.

Obviously, if the Applicant/Plaintiff is seeking for the amendment and joinder and is aware that the current relief for 'Specific Performance' would fail, prompted the Appellant/ Plaintiff to seek amendment and joinder after lapse of 6 - 7 years from the time of filing/commencement of the claim accordingly. One cannot just seek amendment and joinder whenever it becomes necessary, rather the party wishing to file/commence proceedings against any defendant/person should correctly and properly be made before filing into court there and then. May be Order 20 Rule 5 of the High Court Rules 1988 allows for the amendment, rather, it is a discretionary matter for the Court to make a decision whether to accede to the Application and/or refuse the same accordingly.

33. Bearing above in mind, I reiterate that to grant and/or refuse leave, is a discretionary matter and may be required if it is clear that it has been exercised on a wrong principle or a conclusion has been reached which would work as a manifest injustice, refer to **G. L. Baker Ltd. v Medway Building Supplies Limited** (1958), WLR 1216 refers.
34. I find that there are insufficient grounds to grant Leave to appeal from the Interlocutory order and the propose appeal is doom to fail.
35. The grant or refusal of stay is also a discretionary matter and herein I do not find any sound reasons sufficient to justify the court in suspending the rights of the successful party to the fruits of litigation.

36. Further, this Appeal will not be rendered nugatory and it will not prejudice the Appellant/Plaintiff, Fiji Football Association when I now proceed to refuse stay as sought herein.
37. The reasons for my refusal to grant amendment of the Appellant/Plaintiff's Statement of Claim and joinder to join the Attorney General as the Legal representative of the Registrar of Titles is explained and contained in my Decision delivered on 25 April 2024.
38. The initial substantive proceedings filed by Appellant/Plaintiff, Fiji Football Association against Nasinu Land Purchase & Housing Cooperative Ltd is impending hearing and determination although the application for amendment of the Plaintiff's Statement of Claim and joinder application to join Attorney General as the legal representative of the Registrar of Titles has been refused on 25 April 2024.

Costs

39. Although the application took sometimes in Court to hear the parties on written and oral submissions, it is only just and fair that each party bears its own costs at the discretion of this court.

Orders

- (i) Leave to Appeal filed on 16 May 2024 is refused and dismissed in its entirety.
- (ii) Stay pending determination of Appeal is also in the like refused and accordingly dismissed.
- (iii) Each party to bear their own costs at the discretion of this Honorable Court.

Dated at **Suva** this **24th** day of **January** ,2025.



VISHWA DATT SHARMA
PUISNE JUDGE

CC: SAMUEL RAM LAWYERS, BA
VIJAY MAHARAJ LAWYERS, SUVA