

A further affidavit by Dewa Nadan was filed on 8 September 1998 with the leave of this Court. Both the summons and the first affidavit were not filed in this Court until 30 July 1998.

The 2nd and the 3rd Respondents strongly oppose the application before this Court. The 2nd Respondent has filed written submissions. The 3rd Respondent has also filed written submissions and has in addition filed 2 affidavits in reply - one by Viliame Batidegei and the other by Bal Krishnan.

I also have had the opportunity of perusing the supplementary affidavit of the 3rd Respondent dated 28 November 1997 and filed in the Court below.

Furthermore I heard oral arguments on behalf of the Applicant, the 2nd Respondent and the 3rd Respondent.

The 1st Respondent (the Housing Authority) is only a nominal Respondent and its Counsel's presence was excused after she appeared and asked for leave.

The Ruling by the High Court against which leave to appeal is sought is dated 13 February 1998 and was sealed on 3 March 1998. Time for filing a notice of appeal against a final decision pursuant to Rule 16 of the Court of Appeal Rules Cap.12 therefore expired on 15 April 1998, i.e. 6 weeks after the decision was sealed.

The time for appealing as prescribed by Rule 16 of the Court of Appeal Rules reads as follows:-

*" *16. Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected), that it to say-*

- (a) in the case of an appeal from an interlocutory order, 21 days;*
- (b) in any other case, 6 weeks."*

It is the Applicant's contention that the order from which it is intended to appeal is an interlocutory one and hence no appeal could be filed until leave was obtained. Reference is made to section 12(2)(f) of the Court of Appeal Act whereby no appeal shall lie:

*"(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court, except in the following cases, namely:-
-----"*

The Applicant points out that an application for such a leave was made to the High Court on 11 May 1998 but it was summarily dismissed on 26 June 1998. Furthermore the Applicant contends that there is no time prescribed for obtaining leave but concedes that such an application should be made within a reasonable time. It is noted that Lyons J.'s decision of 13 February 1998 was sealed on 3 March 1998.

Mr Isireli Fa, Counsel for the Applicant, relies on the "application approach" adopted by this Court in Suresh Sushil Chandra Charan & Anor v Syed M. Shah & Ors in Civil Appeal No. 29 of 1994 (unreported) for his contention that Lyons J.'s decision or order was an interlocutory one.

Proceeding on the basis that Lyons J.'s decision was an interlocutory one, the time for appealing against such a decision expired on 25 March 1998 in terms of Rule 16 of the Court of Appeal Rules, i.e. 21 days after the sealing of an interlocutory order. But the application to the High Court for leave to

appeal was not made until 11 May 1998, i.e. some 47 days after the time for appealing had expired.

Re time for making leave to appeal application

I agree that there is no specific provision limiting the time within which an application for leave to appeal from an interlocutory order may be made.

If leave to appeal is necessary then surely having regard to the purpose of Rule 16, an application for such a leave should be made as soon as possible but in any case before the time for appeal expires. Any other interpretation will lead to an absurd situation whereby an Applicant could at his whim choose the timing of his leave application possibly with prejudice to all others involved. Furthermore by virtue of Rule 27 of the Court of Appeal Rules any application for extension of time after time for appealing has expired, needs to be made to the Court of Appeal. Rule 27 reads as follows:-

"27. Without prejudice to the power of the Court of Appeal, under the Supreme Court Rules as applied to the Court of Appeal, to enlarge the time prescribed by any provision of these Rules, the period for filing and serving notice of appeal under rule 16 may be extended by the Court below upon application made before the expiration of that period."

In my view once the time for appealing has expired the proper Court to apply for leave to appeal and for extension of time to appeal is the Court of Appeal because the two matters are so inextricably linked.

Be that as it may no such application was made to the Court of Appeal until 30 July 1998 although application for leave to appeal was dismissed by the High Court on 26 June 1998, i.e. after a lapse of over 5 weeks.

Consequently the present summons seeking leave to appeal and an extension of time to appeal, has been filed after time for appeal had expired. If Lyons J.'s decision was a final one time for appealing expired on 15 April 1998; if it was an interlocutory one the time expired on 25 March 1998. Counsel has offered no reasonable explanation for such a lengthy delay which rightly could be classified as fatal to any application for leave in such circumstances.

Even more important than the absence of a satisfactory explanation for such a lengthy delay, is the obligation on the Applicant to show there is at least a reasonable chance of succeeding on appeal if leave were granted.

Background

The facts can be briefly described as follows. On 22 November 1996 the Applicant filed against the 3 Respondents a writ and statement of claim in the Lautoka High Court "*suing in a representative capacity as a representative of the majority of the members of the Mataqali Navusabalavu of the Yavusa Bila of Tavualevu Village, Tavua in Ba Province.*" He sought the following orders:-

- “1. *A Declaration that the purported assignment of lease monies belonging to Mataqali Navusabalavu Housing Scheme is unlawful and as such null and void.*
2. *An Injunction against the 1st Defendant from proceeding with the purported Navusabalavu Housing Scheme at Tagitaginatua, Tavualevu Village to be financed out of the lease monies payable to Mataqali Navusabalavu.*”

He alleged

- (1) that the 3rd Respondent fraudulently procured signatures which purported to represent that a majority of members of the Mataqali Navusabalavu consented to the 2nd Respondent assigning lease monies payable to the Yavusa Navusabalavu for the leasing of their lands to the 1st Respondent to enable the development of the Navusabalavu housing scheme to proceed; and
- (2) that because of that unlawful activity of the 3rd Respondent and the negligence of the 2nd Respondent the Mataqali Navusabalavu would as a result be deprived of their lease moneys.

On 4 March 1997 Sainivalati Nasau, the 3rd Respondent, filed a motion to strike out Action No. HBC0394 of 1996L. It is not in dispute that the 3rd Respondent is the Turaqa ni Mataqali.

On 13 February 1998 Lyons J. struck out the said Action under Order 18 Rule 18.

On 3 March 1998 the striking out order was sealed.

On 11 May 1998 the Applicant filed a leave to appeal application in the Lautoka High Court.

On 26 June 1998 Lyons J. summarily dismissed the leave to appeal application.

On 30 July 1998 the Applicant filed Summons in the Fiji Court of Appeal seeking the four orders mentioned at the outset.

In summary the Applicant objects to the proposed Navusabalavu Housing project despite the endorsement of the Prime Minister and the Minister of Housing and the approval of the 1st and 2nd Respondents.

For his part the 3rd Respondent relies on the majority of the Mataqali Navusabalavu as registered in the records maintained by the Native Lands Commission.

Re prejudice

I refer to the affidavit of Viliame Batidegei the son of the 3rd Respondent He is a member of the Mataqali by virtue of birth and has been appointed one of the trustees of the Housing Scheme.

In this capacity as trustee he deposes that following the judgment of Lyons J. dated 13 February 1998 the 1st Respondent progressed the development of the Housing Scheme by inviting tenders on 27 May 1998 to build 17 three bedroom houses; 1 four bedroom house; and 1 three bedroom house including also a meeting hall; that tenders closed on 12 June 1998; that tenderers were shortlisted; and that he and his fellow trustee of the Housing scheme have selected the successful contractors to build the houses. They notified the 1st Respondent accordingly on 21 July 1998.

The Applicant's summons seeking various orders was filed in this Court on 30 July 1998 - i.e. after tenders had been accepted and 5 ½ months after delivery of the judgment on 13 February 1998 and 47 days after dismissal of leave to appeal application by Lyons J. As a result this trustee in his affidavit explains -

".....it is clear that serious harm will be caused to the Third Respondent and the majority of the members of the Mataqali of whom he is the traditional head if leave to appeal out of time is granted to the Appellant. Each day of delay results in further increase in building costs and continued deprivation of decent housing to at least 18 households of the Mataqali. Accordingly, I oppose the grant of leave to appeal out of time as sought by the Appellant. I also oppose the grant of the injunctive orders sought by the Appellant."

There can be no doubt that any further delay by way of stay or an injunction can be very prejudicial to the 3rd Respondent, the trustees and indeed the majority of the mataqali members.

Re prospect of success

After reviewing all the evidence Lyons J. concluded his judgment as follows:-

"For the above reasons, I hold that the Plaintiff is not representative of the majority of the mataqali. Thus he cannot bring this action for and on behalf of the mataqali, as is his claim.

To allow him to continue when he does not have such authority is to allow an abuse of the court's process. The Plaintiff pleads to be exercising a proprietary right of the mataqali. He is not pleading that he is exercising a personal right as in the cases referred to by his Counsel (2). As this is the case, and as he does not appear to be truly representative of the mataqali, the Plaintiff lacks locus standii.

Accordingly the Plaintiff's action is struck out."

In arguing that the Applicant's intended appeal has no prospect of succeeding the Counsel for the 2nd Respondent referred to the following High Court cases which appear to have relevance to the issue of representative action and locus -

- (1) Naimisio Dikau -v- NLTB - Civil Action No. HC 1/1984.
- (2) Meli Kaliavu & Ors -v- NLTB 1956 5 FLR (17).
- (3) Timoci Bavadra -v- NLTB - Civil Action No. 421/1986.

(As to provisions for representative action see Order 15 Rule 15(1) of the High Court Rules.)

There was solid affidavit evidence before Lyons J. that the Applicant did not represent the majority of the members of the mataqali and that the 3rd Respondent did. Any allegation of fraud does not affect the finding by Lyons J. that the Applicant does not represent the majority of the mataqali. In the light of his findings the conclusion that the Applicant had no locus standi was inevitable and the striking out order under the High Court Rules (O.18 r.18) was unavoidable.

Conclusion

In my view when an Applicant fails to apply for leave to appeal within the time prescribed for appealing, his status undergoes a radical change. In the absence of any satisfactory explanation for such a failure, the omission can be fatal. In any case the Applicant will in such a situation carry a heavy burden to satisfy the court that leave ought to be granted in the interest of justice and that the time for appealing be extended.

The Applicant has wholly failed to discharge the burden that rested on him that it is in the interest of justice that indulgence should be granted to him. After considering all the material before me in the light of oral arguments advanced, I have had no hesitation in coming to the conclusion that there was

unreasonable delay in bringing the present application before this Court, that such delay has not been satisfactorily explained, that the length of delay is such as to be prejudicial to the interest of the 3rd Respondent and the majority he represented and that any stay will further aggravate the situation, that there is no realistic prospect of the intended appeal succeeding if leave were granted and time extended. Indeed I would say that if the intended appeal were allowed to proceed it would be destined to wholly fail.

Decision

In the circumstances the applications for leave to appeal, extension of time, stay and injunction are dismissed with costs to the Respondents. I fix the costs (inclusive of disbursements if any) as follows:-

- To the 1st Respondent \$75.00
- To the 2nd Respondent \$250.00
- To the 3rd Respondent \$400.00.

Observations

Mr Fa indicated to me that if he fails to obtain leave he would consider bringing a fresh action in the High Court. I might add that the High Court does not appear to be the proper forum to resolve the dispute existing between members of the mataqali.

Such cases as the present can involve customs, traditions and usages and also the existence or extent of application of customary laws which are best

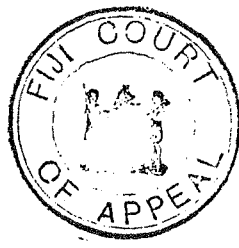
decided by the Native Lands Commission, the acknowledged expert authority on land issues and disputes.

For that reason the Native Lands Act (Cap 133) makes special provision for the settlement of disputes between Fijians in special cases.

Section 16(1) provides that in the event of any dispute the parties to which are Fijians the Minister may delegate a member of the Native Lands Commission to hold an enquiry.

Section 17(1) further provides that in the event of any dispute between Native Fijians as to the headship of any division or subdivision of the people having the customary right to occupy and use any Native lands again the Native Lands Commission may hold an enquiry.

Under Native Lands (Amendment) (Appeals Tribunal) Act 1998 (Act No. 44 of 1998) decisions of the Native Lands Commission concerning disputes as to headship of mataqali etc are now subject to appeal to the Appeals Tribunal.



Moti Tikaram

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Sir Moti Tikaram
President, Court of Appeal, Fiji