

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

Miscellaneous Application No. 9 of 2006
(High Court Civil Action No: HBC 249/05L)

BETWEEN:

LIKULIKU BAY LIMITED

Applicant

AND

INOKE KOROI

MOSESE NACAKE

LAITIA BULI

MATAQALI VUNABUEVU

Respondents

Ms. L. Vaurasi for the Applicant
K. Kumar for the Respondents

DECISION

- [1] This is an application for leave to appeal out of time against Judgment and Orders of the High Court at Lautoka dated 7 March 2006. The Applicant also seeks the stay of the Orders made pending disposal of the appeal.
- [2] On 2 September 2005 the Plaintiffs, who state that they are the native owners of land known as Nosa which is situated on Waya Island in the Yasawa Group commenced proceedings by writ issued against the Native Land Trust Board, as first Defendant and against the Applicant herein as second Defendant.

[3] Very serious allegations were made against the Defendants. It was said that in breach of their statutory fiduciary duty owed by the first Defendant to the Plaintiffs, the first Defendant had agreed, without obtaining the consent of the Plaintiffs, to lease their land for development purposes to the second Defendant. It was also pleaded that the second Defendant was aware of the first Defendant's breach of its fiduciary duties and in particular that it was aware that the Plaintiffs had not consented to their land being leased and that such signatures which had been obtained by the first Defendant from the Plaintiffs purportedly consenting to the lease had been forged.

[4] In paragraph 9 of the Statement of Claim it was pleaded that "the Defendants conduct towards the Plaintiffs [was] so reprehensible that it warrants an award for exemplary damages". It was pleaded that the first Defendant knew that the signatures of consent were forged and that the second Defendant was guilty of:

"Using and/or engaging the assistance of individuals to forge signatures of several members of the Mataqali Vunabuevu".

[5] The Plaintiffs sought:

"(i) for a declaratory order that the lease was issued in breach of Section 8, 9 and 16 of the NLT Act and is therefore null and void.

(ii) Order restraining the second Defendant whether by its servants or agents howsoever:

- (a) from preventing or in anyway inhibiting the Plaintiffs or any member of the Mataqali Vunabuevu from entering upon, remaining on, residing or in any other way using the land known as Nosa (or any part thereof);
 - (b) from removing, dismantling or destroying any improvements or uprooting any crops or vegetables presently growing or to be grown on the land known as Nosa (or any part thereof).
- (iii) Order restraining the first and second Defendants whether by its servants or agents from howsoever dealing with the agreement for lease
 - (iv) Judgment for exemplary damages against the Defendants
 - (v) Cost.
 - (vi) Such further other relief as this honorable Court deems just."

[6] On 29 September 2005 solicitors for the Applicant wrote to the Plaintiff's solicitors advising them that they had just received instructions from their client who was abroad. They sought a further 19 days to file the Acknowledgement of Service and Defence.

[7] On 30 September 2005 the Plaintiff's solicitors advised the Applicant's solicitors that judgment in default of appearance had

already been entered. The Judgment, dated 28 September 2005 is as follows:

"Judgment by Default

NO APPEARANCE having been filed by the second Defendant herein.

IT IS THIS DAY ADJUDGED

- (i) That the second Defendant do pay the Plaintiff the exemplary damages to be assessed and;
- (ii) Cost of this action on a solicitor/client basis."

[8] On 14 October 2005 the first Defendant filed a comprehensive and detailed Defence to the Plaintiff's claim. It denied the Plaintiff's standing to bring the action and denied forgery. It pleaded that the decision to grant the lease for the project (the value of which amounted to no less than F\$45,000,000) was reached after full consultation with the native owners of the land. Unfortunately, as a result of a clerical error, the Defence bore the wrong action number and was apparently as a result misfiled. The first Defendant did not appear on this application and it is not clear to me what occurred after the first Defendant's Statement of Defence was filed. It appears however that either judgment in default of defence or in default of appearance was also obtained by the Plaintiffs against the first Defendant. The precise terms of this judgment were not, however, disclosed to me.

[9] On 24 October 2005, the Applicant filed an application in the High Court pursuant to RHC O 13 r 10 seeking to have the judgment in default of appearance set aside. It appears that the

first Defendant filed a similar application. In a supporting affidavit the Applicant's managing director deposed that he was out of the country when the writ was served and was therefore not in a position properly to instruct his solicitors. Upon his return to Fiji he promptly gave his solicitors instructions. In paragraph 9 of his affidavit he deposed that the Applicant had a "good and meritorious defence". In paragraph 11 he deposed that the Applicant, which had already invested "hundreds and thousands of Fiji dollars" in the project would be financially ruined if the judgment were allowed to stand and the default judgment was not stayed.

[10] In its draft Statement of Defence annexed to the supporting affidavit the Applicant denied any wrong doing and in particular denied being party to any fraudulent conduct. It relied on the lease granted to it by the first Defendant and stated that it was a genuine investor in Fiji. It put the Plaintiff to strict proof of the allegations made against it.

[11] On 7 March 2006 the High Court heard the Defendants' applications to set aside the Default Judgment. In a ruling delivered on the same day it dismissed the application. There was uncertainty as to whether the dismissal was a final or interlocutory order and whether therefore leave to appeal the same was required. An application was made within time by the Defendants for leave to appeal against the dismissal, however this application was dismissed on 2 June 2006. The reasons for the dismissal have not been made available. The present application was filed on 29 June, that is, 6 days outside the 21 days period allowed for a second application for leave to appeal against an interlocutory order. In the context of the whole time

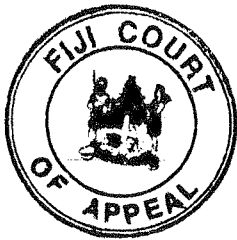
frame of this proceedings I do not regard this 6 day period as significant.

- [12] As appears from the ruling delivered on 7 March 2006 the High Court took the view that the affidavit filed by the Applicant fell some way short of "condescending to the particulars" of the Plaintiff's claim: "the Defendants ... have not in their affidavit proved prima facie what will be the facts of the proposed defence".
- [13] In my opinion it is at least arguable that in arriving at that conclusion the High Court may have overlooked the very detailed Defence already filed by the first Defendant (the relevance of which, in analogous proceedings, was considered by this Court in Magan Lal Brothers Limited v. L.B. Narayan Civ. App. 31/84 and Chandra Lachmaiya Naidu v. Carpenters Fiji Ltd Civ. App. 48/1991), the fact that the Plaintiffs claim for fraud was not, as required by the rules particularized in any way and that the second Defendant's defence was closely dependent on the Defence filed by the first Defendant.
- [14] As already noted, the development of this tourist resort was a major and expensive undertaking. The first Defendant is the statutory body entrusted with the administration of native lands. Very serious allegations of fraud have been pleaded. It is not clear what, precisely, in terms of the relief claimed in the writ is the extent of the default judgment obtained against the Defendant. Mr. Kumar accepted that neither injunctive nor declaratory relief could be obtained in default of appearance. It is not clear to me that exemplary damages can be awarded in this way.

[15] While the persistent and repeated failure of litigants, and the first Defendant in particular, to comply with the rules of Court is a source of concern to the court and irritation to other parties, it is in my view at least arguable that given the nature of the Plaintiff's claim and the nature of the defences advanced the matter should have been allowed to go to trial in the normal manner (see generally observations of this court in Bhawis Pratap v. Christian Mission Fellowship ABU 93/2005).

[16] The application succeeds. Leave is granted to appeal out of time. There will be a stay of the execution of the judgment of the High Court entered on 7 March 2006 until further order of this Court.

[17] There will be no order as to costs.



A handwritten signature in black ink, appearing to read "M.D. Scott", is written above the printed name.

M.D. Scott
Resident Justice of Appeal

17 October 2006