IN THE COURT OF APPEAL, FIJI ISLANDS
AT SUVA

Appellate Jurisdiction

MISCELLANEOUS ACTION NO. 26 OF 2007
(On Appeal from the High Court Civil Action No. HBC120 of 2007L)

BETWEEN	:	KALIOVA MASAU	*Appellant*
AND	:	ATTORNEY-GENERAL OF FIJI	*1st Respondent*
AND	:	REGISTRAR OF TITLES	*2nd Respondent*
AND	:	NATIVE LAND TRUST BOARD	*3rd Respondent*
AND	:	LAGOON INVESTMENTS LTD.	*4th Respondent*
AND	:	VATULELE JOINT VENTURE TRUSTEE LTD.	*5th Respondent*
AND	:	WILLIAMS CAPITAL NO. 1 LTD.	*6th Respondent*

Before the Honourable Justice of Appeal Mr Justice John E Byrne

Counsel	:	R. Matebalavu for the Appellant/Applicant N. Rajendra for the 3rd, 5th & 6th Respondents A. Willy for the 4th Respondent
Dates of Hearing & Submissions	:	6th November 2007, 19th December 2007, 14th, 15th January & 12th February 2008
Date of Ruling	:	4th July 2008

R U L I N G

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[1] The Applicant has made an application for leave to appeal out of time from an Order of Connors J. in the High Court dated the 19th of April 2007. The Applicant had made an ex-parte application to Connors J. seeking injunctive relief against the Respondents. Connors J. refused the application.

[2] The Order was sealed on 8th May 2007. The Applicant filed a Notice of Appeal on the 10th of May 2007. A Summons to fix Security for Costs was filed on 29th May 2007. On 14th June 2007, Security for Costs was fixed in the sum of $2,000.00 to be paid by the Applicant within 28 days.

[3] The Applicant failed to pay the Security for Costs within the time permitted.

[4] The Applicant had sought an injunction in the High Court to restrain the Respondents from dealing with land that is the subject of the action in the High Court, namely Native Lease 28085. The 5th Respondent settled the acquisition of this lease on the 26th of April 2007. Connors J. in the High Court considered that the Applicant had a right to claim damages only when he refused the injunction. He made no order for costs.

[5] The Motion seeking leave to appeal out of time was filed in this Court on the 11th of September 2007 nearly five months after the date of the Order. No explanation has been given by the Applicant as to why it did not pay the Security for Costs by the 12th of July 2007.

[6] Likewise there is no explanation in the Affidavit by Arti Mala Naidu supporting the motion as to why the Applicant did not file a fresh Notice of Appeal between the 12th of July 2007 and 2nd of August 2007.

[7] Rule 17 of the Court of Appeal Rules allows the Court of Appeal Registry to deem an appeal to be abandoned if within not less than 14 days and not more than 28 days an Appellant fails to deposit with the Registrar the sum fixed to security for costs. By Rule 17(2) although an appeal is deemed to be abandoned, a fresh Notice of Appeal may be filed before the expiry of 21 days in the case of an interlocutory order. This was not done in this case.

[8] Paragraph 10 of the Affidavit of Arti Mala Naidu filed on the 11th of September 2007 states that the reason why a fresh Notice of Appeal was not filed was because the Applicant's solicitor had trial commitments.

[9] However no particulars are provided on the trial or how long Mr Matebalavu was engaged in it and no reasons are given as to why he could not file the notice before the trial began.

[10] In **Native Land Trust Board -v- Rajesh Kumar & Anr.** Civil Appeal No. ABU054 of 2004, Ward J. said at page 4 of the Judgment:

> ***"Ignorance of counsel is rarely sufficient ground for allowing an extension of time and similar considerations apply in this case ..."***

[11] In **John Beater Enterprises Propriety Ltd. -v- Samuel Fong** Civil Appeal No. Misc. 1/06 Scott J.A. at page 4 stated that:

"When considering the circircumstances of the case five principal factors are normally taken into account. These are:

(i) The reason for the failure to lodge the appeal within the appeal period;

(ii) The length of the delay;

(iii) Whether there is a question justifying serious consideration;

(iv) Where there has been substantial delay, have any of the grounds such merit that they will probably succeed" and

(v) The degree of prejudice to the Respondents in enlarging time".

[12] In his Affidavit filed on the 11th of December 2007 Arti Mala Naidu states that the Applicant sought injunctive relief to protect the legitimate interests and expectations of the present and future members of the Mataqali of which the Applicant is a member. Whether or not this is so is not necessary for me to decide because there is evidence from the Respondents that they would be prejudiced if I were to allow the present Application. They say that because Native Lease 28085 has already been acquired, the Applicant is not entitled to injunctive relief. The settlement cannot be stopped; because of this, the 5th and 6th Respondents submit that the proposed appeal of the Applicant has now been rendered nugatory.

[13] They say that they will inevitably suffer prejudice. The 5th Respondent settled the acquisition of the land on which there is a resort being built on the 26th of April 2007. Settlement required the 5th Respondent to take

on debt which is secured against, inter-alia, Native Lease 28085 which it acquired as part of the acquisition of the resort.

[14] Due to Reserve Bank policy changes introduced a few weeks before settlement, the 5th Respondent was forced to seek offshore finance at the last minute in order to be able to settle. The 5th Respondent claims, and this is not denied by the Applicant, that this was at a very high cost. The 5th Respondent submits that it has invested considerable time and money into running and upgrading the resort and surrounding land. Due to the events of 5th December 2006 in Fiji, the 5th Respondent states that it has been required to fund regular and substantial shortfalls in working capital to keep the resort running and the staff paid, most of whom, it is claimed, and again not denied by the Applicant, are from the three Mataqali which own the land that is subject of the lease. The 5th Respondent says that it has also invested considerable funds in commencing the upgrade and re-development of the resort with the total amount now invested being approximately $24 million Fijian dollars.

[15] Furthermore the 5th and 6th Respondents say that following the acquisition of the resort and the Native Lease the 5th Respondent has entered into a management contract with Six Senses Resorts and Spas granting Six Senses the right to manage the resort for a minimum period of twenty years. It is submitted that if the Applicant is allowed to appeal out of time and later was successful in obtaining a retrospective injunction, the 5th Respondent would suffer heavy losses as a result of being unable to fulfill his obligations under the management arrangements with Six Senses.

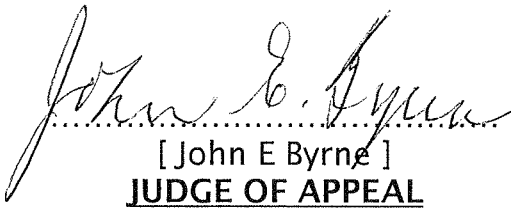
[16] The Applicant's argument fails to take into account the broader picture of benefit to Fiji by this development. If, as the Respondents claim, the

Resort is likely to attract tourists and investors, that can only be good for Fiji as a whole and if, eventually at trial the Applicant was successful I agree with the trial Judge, that damages will be sufficient compensation for any losses which he fears he and his Mataqali will suffer.

[17] In applications of this nature it is well to remember the words of **Griffiths L J in Van Stillevoldt B V -v- El Carriers Inc**. reported in [1983] 1 All ER 699 at p703 h-j:

> ***"It cannot be over-stressed that adherence to the timetable provided by the rules is essential to the orderly conduct of business in the Court of Appeal. The setting down of an appeal is a vital step because it is this step that informs the registrar's office that an appeal is in fact effective".***

[18] Before concluding this Ruling it is desirable to refer to the undertaking in damages given by the Applicant. The Applicant states he is genuinely unable to provide an adequate undertaking as to damages and for this reason asks that the Court waive its *"customary pre-requisite as to the adequacy of the undertaking as to damages"*. Increasingly nowadays the Courts have required more than just an undertaking as to damages for persons seeking an injunction but also particulars of the Applicant's ability to pay any should it eventually fail in its action. I see no reason in this case why the Applicant should be relieved of that responsibility but, equally importantly, I consider that no satisfactory explanation has been given the Applicant's failure to comply with the rules of this Court in a matter of filing a fresh Notice of Appeal. For these reasons I dismiss the application. The Applicant must pay the Respondents' costs to be taxed if not agreed.



[John E Byrne]
JUDGE OF APPEAL

At Suva

4th July 2008