

IN THE COURT OF APPEAL
FIJI ISLANDS AT SUVA

[Misc. Action No. 13 of 2009]
(On appeal from the High
Court of Fiji at Labasa in Civil
Action No.40 of 2008)

BETWEEN : **DIGICEL FIJI LIMITED**
(APPLICANT)

AND : **MANASA RALAGO, RATU JONE COLATA and**
AKAI QAMO
(RESPONDENTS)

CORAM : **John E. Byrne, AP**

COUNSEL : **R. Naidu for the Applicant**
: **T. Fa for the Respondents**

Dates of Hearing
and Submissions: **25th January, 23rd February 2010**

Date of Ruling : **23rd August 2010**

RULING ON APPLICATION FOR
LEAVE
TO APPEAL

[1] The Respondents as Plaintiffs in Labasa High Court Civil Action No. 40 of 2008 instituted proceedings by representative's action against the applicant, the original

defendant under the Native Land Trust Act Cap. 134 of The Laws of Fiji. The respondents alleged in the High Court that without a lease or licence from the Native Land Trust Board (NLTB) their statutory trustee, the applicant had entered their **Mataqali Naudrau** land that is known as **Mount Devodevomasi** and thereon erected a Tower and its telecommunication transmission with its own infrastructure. In a letter dated 12th November, 2008, to the Respondents, the Native Land Trust Board confirmed that the applicant had not been given a lease over native land belonging to **Mataqali Naudrau**.

- [2] The respondents then sought a High Court Order that the applicant was trespassing on their land and also sought an injunction and compensatory damages.
- [3] Section 5 of the Act states that no native land shall be alienated by Fijian owners whether by sale, grant, transfer or exchange except to the State. Section 8 of the Act allows the alienation of native land by the Native Land Trust Board only by lease or by licence. Thus, unless the applicant can show that it has a lease or licence issued by the Native Land Trust Board it is trespassing on the land in question.
- [4] The matter came before Mr. Justice Calanchini on the 3rd of July 2009 when he ordered that he would hear the respondents' summons to Strike Out Defence first and stayed the applicant's summons for security for costs.
- [5] The applicant now seeks leave to appeal these orders, contending that its summons for Security for Costs should be heard first.
- [6] The application is made under Section 35 (1)(a) of the Court of Appeal Act.
- [7] The following grounds are submitted by the applicant as to why leave to appeal should be granted:
- (i) breach of the substantive rights of the applicant;

- (ii) error made by the High Court has prejudiced the applicant in that the Court failed to take into account the importance of security to costs;
- (iii) injustice resulting from such error;
- (iv) the importance of the issue such as to justify the matter being argued before the Full Court of this Court.

[8] Under Section 35(1) (a) of the Court of Appeal Act a Judge of the Court may exercise the following powers of the Court:

- (a) To give leave to appeal to the Court;
- (b) To extend the time within which notice of appeal or of an application for leave to appeal may be given.

[9] Section 12(2) (f) of the Court of Appeal Act provides inter-alia that no appeal shall lie – 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 High Court except in (and then 5 types of case are mentioned, none of which applies here).

[10] It seems to be common ground and it is also correct law that orders for leave to appeal interlocutory judgments or orders are rarely given by an appellate court. There must be exceptional circumstances to warrant such orders.

[11] The applicant submits that this is one of the rare cases where leave to appeal should be granted due to the exceptional circumstances existing here. It is submitted that in cases coming to the High Court security for costs has been given priority and the learned Judge in the High Court erred by not doing so.

[12] In *Furuuchi Suisan Company Limited v. Hiroshi Tokuhisa and Others, Civil Action No. 95 of 2009* in my alter-ego as a Judge of the High Court I ordered the Plaintiff to pay \$20,000 into Court as security for costs in an action between the Plaintiff, a company incorporated and operating in Japan and a defendant company incorporated and operating in Fiji.

- [13] It is important to note immediately that in that case the plaintiff was ordinarily resident out of the jurisdiction so that the facts were different from those of the instant case.
- [14] One of the cases on which I relied was Porzelack KG v. Porzelack (UK) Limited 1987 1ALLER 1074 where Sir Nicolas Brown Wilkinson V.C said at p.1076 “that the purpose of ordering security for costs against a plaintiff ordinarily resident outside the jurisdiction is to ensure that a successful defendant will have a fund available within the jurisdiction of the Court against which it can enforce a judgment for costs”.
- [15] It is alleged by the applicant, and not presently denied by the respondents, that they are all persons with no means to pay costs. That in itself does not constitute a reason for making an order for security for costs although, of course, it must be a matter which a Court will consider when deciding whether or not to make such an order.
- [16] In this case Calanchini, J, held that he should give the respondents’ application to strike out the defence priority for four reasons:
- **First**, the respondents’ notice of motion had been filed more than two months before the applicant’s summons.
 - **Secondly**, it appeared to be more practicable to allow the respondents’ Motion to be heard first. In the event that the respondents were successful then the applicant’s application for security for costs became irrelevant. On the other hand, if the applicant was successful an appropriate order for costs could be made to ensure that the action did not proceed any further until the applicant’s costs had been paid. There would be no injustice to the applicant.
 - **Thirdly**, the application for security for costs concerned the Judge. It appeared from the pleadings that the applicant had not established the

threshold test in order for the Court to consider whether it should exercise its discretion and make the order sought.

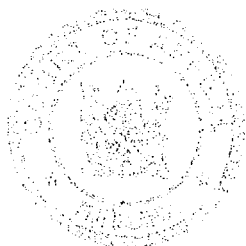
- [17] The Judge then quoted Order 23 Rule 1(b) of the High Court Rules which names one of the four categories of plaintiffs who may subsequently be ordered to provide security for costs. Rule 1(b) refers to a plaintiff who is a nominal plaintiff suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so.
- [18] The Judge held that the respondents were not simply nominal plaintiffs. They had commenced the action on their own behalf and as representatives of the affected members of the **Mataqali Naudrau**.
- [19] The **fourth** reason which concerned the Judge was that the applicant's application had not been made promptly. This was held to be important in *Sir Lindsay Parkinson and Co. Ltd. V. Triplan Ltd. (1973) 2 ALLER 273.*
- [20] This Court confirmed a decision of the High Court which had refused to make an order for security for costs when the Judge found that the defendants had delayed unduly in bringing their application in *National Bank of Fiji v. 21C Garden Island Woo IL Pacific Co. Ltd. (in Liq.) and Others, Civil Appeal No. 11 of 1992.*
- [21] In the instant case, Calanchini, J found that the applicant had given no explanation for the delay in making its application some nine months after the Writ had been issued.
- [22] In my judgment this delay was inordinate and for this reason alone I am not prepared to interfere with the Order of Calanchini, J.
- [23] The other and equally important reason is that the Courts are reluctant to interfere with interlocutory orders. Leave to appeal will not generally be given from an interlocutory order unless the Court sees that some injustice would be caused. Sir

Moti Tikaram said in Kelton Investments Limited and Tappoo Limited v. Civil Aviation Authority of Fiji and Another, Civil Appeal No. ABU 0034 of 1995: "The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal is rarely given". Jordan C.J said In re THE WILL OF F.B. GILBERT (Deceased), (1946)46 S. R. NSW 318 at 323:

"There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal".

[24] For the reasons I have given I refuse leave to appeal the order of Calanchini, J.

Dated at Suva this 23rd day of August 2010.



A handwritten signature in cursive script, reading "John E. Byrne".

JOHN E. BYRNE
Acting President